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1561

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M.A. (PSYCHO.); M.A. (POL. SC.); PUNJAB
L.L.B. ALLAHBAD
Advocate
Supreme Court of India
High Court of J & K State
9B, R. C. ROAD, PRATAP PARK.
SRINAGAR (KASHMIR.)

THE

LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Indian Appeals :

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

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LIST

OF THE

JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL.

1898.

Earl of *Rosebery*, Duke of *Devonshire*, } Lord Presidents.

Earl of *Halsbury*, Lord *Herschell*, } Lord Chancellors.

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Sir *Henry Strong*.
Mr. *Way*.

And others ex-officio under the Appellate Jurisdiction Acts of 1876 (39&40 *Vict. c.* 50) *and* 1887 (50 & 51 *Vict. c.* 70) *and the Judicial Committee Amendment Act*, 1895.

BORROWER'S NO.	ISSUE DATE	BORROWER'S NO.	ISSUE DATE

ERRATUM.

Page	*Line*	*For*	*Read*
158	8 from end	s. 3 of Act VII. of 1878.	s. 2 of Act VII. of 1868.

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IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

GANGADHAR TILAK . . . . . APPELLANT; J. C.*

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AND

QUEEN-EMPRESS . . . . . RESPONDENT. *Nov.* 19

ON APPEAL FROM THE HIGH COURT OF BOMBAY.

Practice—Special Leave to Appeal in Criminal Case.

Case in which their Lordships, acting on their well-known rules, declined to advise special leave to appeal in a criminal case.

THE petition stated that the petitioner, who was editor, proprietor, and publisher of a weekly journal printed and published in Bombay and called the *Kesari*, had been found guilty under s. 124A of the Indian Penal Code before Strachey J. by a majority of six to three of a special jury of attempting to excite feelings of disaffection to the Government established by law in British India, and was sentenced to eighteen months' rigorous imprisonment; that the judge had refused the petitioner's application to reserve the following questions of law:—

(1.) Whether the sanction given to the prosecution under s. 196 of the Criminal Procedure Code was sufficient?

(2.) If not, whether the Court had power to accept the commitment under s. 532 and to proceed with the trial?

(3.) Whether the direction to the jury that disaffection

* *Present*: THE LORD CHANCELLOR, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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means absence of affection in any degree towards the British rule or its administrators or representatives is correct?"; that the journal was issued in the Marathi language, and that the petitioner had been selected by the native community to represent them in the council of the Governer.

The petition also stated that on June 15, 1897, the *Kesari* contained an account of the Shivaji Coronation festival which has just taken place, Shivaji being the founder of the Mahratta kingdom. As part of the report, a summary was given of a lecture delivered by Professor Bhanu, under the presidentship of the petitioner, in which he produced a quantity of new evidence to shew that the killing of Afzulkhan by Shivaji was not a treacherous murder, but was an act of self-defence and lawful warfare. The lecture was followed by observations upon it from Professor Jinsivale and the petitioner, which were charged in the indictment as being seditious. In the same issue of the *Kesari* there appeared certain Mahratta verses sent by a correspondent entitled, "Shivaji's Utterances," which were also charged as being seditious. It appears from the record that these verses were of an inflammatory character, but as they were not set out in the petition, they need not be here given in detail. The same issue contained the second of three articles on the Jubilee, written by the petitioner, which were relied on by him as shewing his loyalty and public spirit.

The material portions of the articles in the issue of June 15 relied on by the prosecution were set out in the petition as follows:—

"At the conclusion of the lecture Professor Bhanu said:—"Every Hindu every Maratha to whatever party he may belong must rejoice at this (Shivaji) festival. We are all striving to regain (our) lost independence and this terrible load is to be uplifted by us all in combination. It will never be proper to place obstacles in the way of any person who with a true mind follows the path of uplifting this burden in the manner he deems fit. Our mutual dissensions impede our progress greatly. If any one be crushing down the country from above cut him off but do not put impediments in the way of others. Let bygones be bygones let us forget them and

forgive one another for them. Have we not had enough of that strife which would have the same value in the estimation of great men as a fight among rats and cats ? All occasions like the present festival which (tend to) unite the whole country must be welcome. So saying the professor concluded his speech. Afterwards Professor Jinsivale said : If no one blames Napoleon for committing two thousand murders in Europe (and) if Cæsar is considered merciful though he needlessly committed slaughter in Gaul (i.e. France) many a time why should so virulent an attack be made on Shri Shivaji Maharaja for killing one or two persons ? The people who took part in the French Revolution denied that they committed murders and maintained that they were (only) removing thorns from (their) path, why should not the same principle (? argument) be made applicable to Maharashtra ? Being inflamed with partisanship it is not good that we should keep aside our true opinions. It is true that we must (we should not hesitate to) swallow down our opinions on any occasion when an expression of them might be thought detrimental to the interests of the country (i.e. nation) but no one should permit his real opinions to be permanently trodden under foot. Professor Jinsivale concluded his speech by expressing a hope that next year there will be witnessed greater unity amongst various parties in Poona on the occasion of this festival."

(Then followed a translation of two Marathi articles in columns 2 and 3 at p. 3 of the issue of the *Kesari* of June 15, 1897.)

"After the conclusion of Professor Jinsivale's speech the President, Mr. Tilak, commenced his discourse. It was needless to make fresh historical researches in connection with the killing of Afzulkhan. Let us even assume that Shivaji first planned and then executed the murder of Afzulkhan. Was this act of the Maharaja good or bad ? This question which has to be considered should not be received from the standpoint of even the Penal Code or even the Smritis of Manu or Yajnavalkya or even the principles of morality laid down in the Western and Eastern ethical systems. The laws which bind society are for common men like yourselves and myself.

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No one seeks to trace the genealogy of a Rishi nor to fasten guilt upon a king. Great men are above the common principles of morality. These principles fail in their scope to reach the pedestal of great men. Did Shivaji commit a sin in killing Afzulkhan or how ? The answer to this question can be found in the Mahabharat itself. Shrimat Krishna's advice (teaching) in the Geeta is to kill even our teachers (and) our kinsmen. No blame attaches (to any person) if (he) is doing deeds without being actuated by a desire to reap the fruit (of his deeds). Shri Shivaji Maharaja did nothing with a view to fill the small void of his own stomach (i. e. from interested motives). With benevolent intentions he murdered Afzulkhan for the good of others. If thieves enter our house and we have not (sufficient) strength in our wrists to drive them out we should without hesitation shut them up and burn (or oppress and exceedingly torment) them alive. God has not conferred upon the Mlenchhas (barbarians or foreigners) the grant inscribed on a copper plate of the Kingdom of Industan. The Maharaja strove to drive them away from the land of his birth, he did not thereby commit the sin of coveting what belonged to others. Do not circumscribe your vision like a frog in a well, get out of the Penal Code, enter into the extremely high atmosphere of the Shrimat Bhagvadgeeta and then consider the actions of great men."

"After making the above observations in connection with the original theme, Mr. Tilak made the following remarks relating to the concluding portion of Professor Bhanu's address : 'A country which (i.e., a people who) cannot unite even on a few occasions should never hope to prosper. Bickerings about religion and social matters are bound to go on until death, but it is most desirable that on one day out of 365 we should unite at least in respect of one matter. To be one in connection with Shivaji does not mean that we are completely to forget our other opinions. For quarrelling there are the other days, of course. We should not forget that Ram and Ravan felt no difficulty whatever to meet in the same temple on the occasion of worshipping (the God) Shankar. After the lecture Pada (verses) of the Samnitra Samaj and Maharashtra Mela were sung, and this brought the second day's (celebration) to a close."

Sect. 124 A of the Penal Code is as follows :—

"Whoever by words either spoken or intended to be read or by signs or by visible representation or otherwise excites or attempts to excite feelings of disaffection to the Government established by law in British India shall be punished with transportation for life or for any term to which fine may be added or with imprisonment for a term which may extend to three years to which fine may be added or with fine."

"Explanation. Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority is not disaffection. Therefore, the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation is not an offence within this clause."

The petition also set out at considerable length the summing-up. The conclusion thereof was as follows: "You will thus see that the whole question is one of the intention of the accused in publishing these articles. Did they intend to excite in the minds of their readers feelings of disaffection or enmity to the Government? Or did they intend merely to excite disapprobation of certain Government measures? Or did they intend to excite no feeling adverse either to the Government or its measures, but only to excite interest in a poem about Shivaji and a historical discussion about his alleged killing of a Mahomedan general?" After commenting minutely upon the articles in question, the learned judge told the jury that the matters for consideration resolved themselves into two heads: "First of all, you must remember the test to be applied is whether these people were trying to stir up a rebellion or feeling of enmity against the Government. Secondly, it is for you to consider the class of readers of the publication and the state of feelings at the time the articles were published, and the natural effect which according to their view the articles of the 15th of June would have upon them at such a time."

He then left the case to them with this final direction:

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"You are to read the articles with the other evidence and, putting aside all prejudice, say if Tilak was trying to make his readers hate the Government, or was commenting on measures with a view to excite disapprobation compatible with a definite policy to support the Government."

The principal grounds upon which the petition sought for leave to appeal from the verdict and sentence were—(1.) that the sanction relied upon was invalid, as it did not state expressly or by reference what were the words which were charged as being capable of exciting disaffection; (2.) the existence of a valid sanction is a condition precedent to the validity of all subsequent proceedings; (3.) the defect was not remedied by s. 532 of the Criminal Procedure Code; (4.) the judge misdirected the jury as to the proper meaning of s. 124 A in a manner materially affecting the finding of the jury; (5.) the judge wrongly directed the jury that in considering the animus of the petitioner in the articles of June 15 they might take into consideration the letter of a correspondent in a previous issue; (6.) the judge directed the jury to consider as affecting the criminality of the language charged against the petitioner a state of excitement existing at that time founded upon an assertion of facts of which there was no evidence; (7.) the judge did not draw the attention of the jury to editorial notes in the *Kesari* of May 18 shewing that the causes of excitement existing on May 4 had been withdrawn at the request of the Hindu community.

Asquith, Q.C. (*Mayne*, *G. H. Blair*, and *W. C. Bonnerjee* with him), for the petitioner, contended that this was a case in which an appeal should be admitted. The misdirection as to the meaning of art. 124 A of the Penal Code raised a question of great and general importance within the meaning of *Reg* v. *Bertrand*. (1) The judge's direction was objected to in that it defined the offence created by s. 124 A in terms too wide, to the effect that disaffection meant simply absence of affection, that it meant a feeling (not translated into overt act) of hatred, enmity, dislike, hostility, contempt, and any form of ill-will to

(1) (1867) L. R. 1 P. C. 530.

the Government; that disloyalty was perhaps the best term, and that it comprehended every possible form of bad feeling to the Government; that a man must not make or try to make others feel enmity of any kind against the Government; that if a man expresses condemnation of the measures legislative or executive of the Government he was within his right, but that if he went further and held up the Government itself to the hatred and contempt of his readers by the imputation of motives or by denouncing its foreign origin or character, that then he was guilty under the section. Reference was made to the definition of the word "disaffection" by Petheram C. J. in *Queen-Empress* v. *Jogendra Chunder Bose and Others*. (1)

It was contended that Tilak's comments had not exceeded what in England would be considered within the functions of a public journalist. It was further contended that the misdirection complained of was of the greatest importance, not merely to the petitioner, but to the whole of the Indian press, and also to all the Indian subjects of the Crown. It affected injuriously the liberty of the press, the right to free speech and public meeting, and the right to petition for redress of grievances. The question turned on the true meaning of the word "disaffection." The framers of s. 124 A had avoided the word "sedition." Petheram C.J.'s definition in the case cited had been "the contrary to affection." Feelings might vary in intensity from indifference or dislike up to extreme hostility. The explanation of law was too uncertain and vague to meet the requirements of the occasion, and amounted to misdirection. For instance, reference had been made to the sub-section or explanation relating to measures of government, and it was laid down that a journalist who criticised a tax or precautions against epidemic (provided his criticism was compatible with a disposition to obey the authorities) would be safe; but if he meddled with general policy he fell within the section. It was contended that the right direction would have been that it was an essential ingredient in an offence under the section that the effect calculated to be produced by the criticism was such a state of enmity as would be incompatible with a disposition to

(1) (1891) Ind. L. R. 19 Calc. 35, 44.

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obey the Government. An intention to excite passive resistance might bring a man within the section; not, it was contended, to excite passion, dislike, or enmity. The ruling applied to particular measures should have been extended to general policy.

Cohen, *Q.C.*, and *Branson*, for the respondent, left the matter in the hands of their Lordships, merely referring to the latest decision on the subject, *Ex parte Carew*. (1)

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships are of opinion, taking a view of the whole of the summing-up, which is of very great length, that there is nothing in that summing-up which calls upon them to indicate any dissent from it, nor any necessity to correct what is therein contained, looking at the summing-up as a whole, and looking at each part of what was said by the light of what else was said. Speaking generally of the argument which has been presented to their Lordships, they are of opinion that no case has been made out consistently with the rules by which their advice to Her Majesty has been hitherto guided in giving leave to appeal in criminal cases; and, therefore, they will humbly advise Her Majesty that this is not a case in which leave should be granted.

Solicitors for appellant: *Payne & Lattey.*

Solicitor for respondent: *Solicitor, India Office.*

(1) [1897] A. C. 719.

BINDESRI NAIK . . . . . DEFENDANT; J. C.*

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GANGASARAN SAHU AND OTHERS . . . . PLAINTIFFS. *Nov.* 10; *Dec.* 8.

(TWO APPEALS.)

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Mortgage Deed—Construction—Post diem Interest.

Where the provisions of a mortgage deed, taken as a whole without exclusive attention to any one of them, stipulate that interest is to run without any limitation as to the period of its currency, post diem interest ought not to be refused.

Mathura Das v. *Rajah Narindar Bahadur Pal*, (1896) L. R. 23 Ind. Ap. 138, followed.

Sect. 17 of Registration Act (III. of 1877) does not apply to judicial proceedings, whether pleadings of parties or orders of court.

APPEALS from two decrees in the same suit by the High Court (March 9, 1893) varying a decree of the Subordinate Judge of Gorakhpur (June 30, 1888).

The suit was brought by the respondents to enforce against the appellant and his father two conditional deeds of sale executed by them in favour of the father of the first and second plaintiffs and one Goshain Moti Gir, the third plaintiff. The defendants contended that nothing was due. The first Court awarded to the plaintiffs the sum of Rs. 24,990 15*a.*, which was raised by the High Court to the sum of Rs. 36,492 12*a.* 3*p.*

The facts are stated in the judgments of their Lordships.

The Subordinate Judge decreed that the property should be foreclosed unless the sum of Rs. 24,990 15*a.*, with interest at 6 per cent., was paid within six months from date of the decree.

In his judgment the Subordinate Judge refused to allow more than simple interest at 18 per cent. on the bonds. He treated the petitions for further time on the admissions contained in which compound interest had been allowed as shewing that the mortgagees had taken undue advantage of

* *Present*: LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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the helplessness of the mortgagors. On the other hand, he held that the land was pledged for interest as well as principal, and that the Statute of Limitations did not apply. Upon this view he found the sum of Rs.24,990 15*a.* as the sum due to the plaintiffs.

Both parties appealed against this decree, the defendants on the ground that nothing was due, the plaintiffs on the ground that more was due and that the mortgage had already been foreclosed.

The High Court made two decrees, whereby in modification of the original decree it declared that the sum due to the plaintiffs was Rs.36,492 12*a.* 3*p.*, for which six months' time was to be given to the defendants, in default of payment the mortgages to be foreclosed.

The High Court in its judgment agreed with the Lower Court that no foreclosure had taken place before suit. It disagreed with the Lower Court by holding that no reason had been shewn why full effect should not be given to the series of applications for further time in each of which compound interest was admitted to be due. The view taken by the High Court appears to have been that the bonds did not contemplate the payment of post diem interest, but that a binding agreement, evidenced by the applications for time, had been entered into between the parties allowing compound interest, and that the last statement of account shewing a sum of Rs.33,444 7*a.* 6*p.* due on that footing, with an agreement to pay interest on that amount for three months at 18 per cent., was binding on the defendants. To this amount the Court added costs, making up the total sum above stated.

Ross, for the appellant, contended that as the petitions were not registered they could not have any effect given to them. See Act III. of 1877, s. 17. They were transactions affecting immovable property. Upon the true construction of the mortgage deeds apart from the petitions, foreclosure could only be enforced when the mortgagors failed to pay the principal sum due, and that amouut had already been liquidated. Post diem interest was not chargeable at all.

Mayne, for the respondents, referred to *Mathura Das* v. *Rajah Narindar Bahadur Pal*. (1)

Ross replied.

1897. Dec. 8. The judgment of their Lordships was delivered by

LORD WATSON. The late Bhairon Naik, and his son and heir Bindesri Naik, who is the present appellant, on August 21, 1875, executed a mortgage, in the form of a conditional sale, in favour of the deceased Debi Parshad, who is now represented by the respondents Ganga Saran Sahu and Ram Saran Sahu, and of the other respondent Goshain Moti Gir. By the terms of that deed the mortgagors acknowledged "that the sum borrowed is Rs.8997 in cash of the current coin; that interest shall be paid on this sum at R.1-8 per cent. per mensem"; and that they had in lieu thereof given a conditional mortgage of the entire village of Ramnagra, and of certain other shares of lands (which need not be enumerated) "for a term of two years from this day, engaging to redeem the mortgaged shares by paying the entire amount in a single sum within or at the time stipulated." The deed provided that, if they should fail to pay the principal money at the time stipulated, the mortgage of the shares should in lieu of that money only be foreclosed; and they should every year pay the interest; and that on default of payment of interest at the end of the year, "the creditors shall be at liberty to treat it as principal, and to recover it with interest thereon from our person and our other property, and also from the property mortgaged."

By a second deed of mortgage by conditional sale, dated May 3, 1876, which recites the previous deed of August 21, 1875, the appellant and his father borrowed from the same lenders "another sum of Rs.2997 of the current coin, engaging to pay interest thereon at R.1-8 per cent. per mensem; that we tack this money on to the conditions of the former deed of mortgage by conditional sale, engaging to pay it with the amount of the said former deed; that on default of payment of the amount of the former deed or of this one, according to the terms of the

(1) L. R. 23 Ind. Ap. 138.

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former deed, the mortgage of the said shares shall, in lieu of the amount of both deeds, be foreclosed, and the sale shall become absolute."

The time of payment stipulated in the first deed, which was made applicable to both, arrived on August 21, 1877. No payment having been made, the creditors, on January 18, 1879, presented an application in the Court of the Subordinate Judge of Gorakhpur, praying that at first the usual process of allowing one year's time should be issued to the mortgagors, and that, if they fail to deposit Rs.21,066 11*a*. 3*p*., the amount of principal and interest then claimed as due, together with future interest and costs of foreclosure, an order might be passed declaring the mortgage to be foreclosed. The record bears, under the signature of the judge, that the application was admitted by the present appellant and his father.

On September 3, 1879, the creditors filed an application stating that they had received two sums, together amounting to Rs.7452, from two persons, one of whom had purchased the entire village Ramnagra, and the other the 8-anna share of Mauza Tina from the mortgagors. They accordingly prayed that Rs.7452 should be deducted from the sum claimed in their original application; that the village Ramnagra and the 8-anna share of Mauza Tina should be exempted from foreclosure; and that the remaining property of the mortgagors should be held liable to foreclosure for the balance of the amount originally claimed by them. The assent of the mortgagors to the application is attested by the signature of the judge.

After the expiry of the year of grace allowed them for consignation or payment, the mortgagors, between December 4, 1879, and May 15, 1886, from time to time presented no less than five incidental petitions to the Court praying for further time. These petitions were, with consent of the creditors applying for foreclosure, confirmed by the Court, and directed to be filed with the foreclosure record. In each of these applications the mortgagors stated the total amount of principal and interest which at its date was owing by them under the two mortgage deeds, after deducting the sums paid to account by their vendees. The sum thus stated by them in their last

application, on May 15, 1886, was Rs.33,444 7*a*. 6*p*. Upon that occasion, by consent of the creditors, they obtained an extension of time for three months; but they failed, as usual, either to consign or pay within the time allowed them.

On December 12, 1887, the creditors filed their plaint in this suit, praying either to have possession on the footing that the prior proceedings had effected a complete foreclosure, or to have the usual foreclosure decree. They claimed that the sum due to them was Rs.43,450 11*a*. 6*p*. In answer, the mortgagors filed a written statement, in which they for the first time maintained that the mortgage deeds did not cover interest, at all events beyond the stipulated term of payment, being August 21, 1877. They did not dispute that in their repeated applications which have been already referred to, they had constantly admitted and asserted that, under the deeds in question, they were not entitled to redeem, except upon payment of the principal sums, with interest thereon at Rs.18 per cent. per annum until paid; and that in respect of such admission and assertion they had got an extension of time with the consent of their creditors. But they contended that none of these proceedings in the Subordinate Court of Gorakhpur could be referred to or founded upon, because they had not been registered in terms of s. 17 of Act III. of 1877.

It does not clearly appear whether the Subordinate Judge was of opinion that interest was due under the mortgage deeds, and must be paid in order to avoid foreclosure. Had he been of that opinion, it would have been unnecessary for him to consider the effect of the statements and admissions previously made by the mortgagors in order to obtain delay. He held that registration of such proceedings was not compulsory, and that these admissions must receive effect; but, being of opinion that the creditors had taken an undue advantage of the mortgagors' helplessness, he, upon grounds which he describes as equitable, found that the creditors were only entitled to simple interest, and allowed the mortgagors to redeem on payment of Rs.24,990 15*a*. within six months.

Both parties appealed against that judgment to the High Court at Allahabad. In disposing of the cross-appeals the

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Court, consisting of Sir John Edge C. J. and Aikman J., expressed an opinion that the mortgage bonds did not appear to contemplate the payment of interest post diem—that is, after the day upon which it was stipulated that the principal of the loans was to be repaid. But they held that the mortgagors, having from time to time obtained extensions of the term of payment, by admissions that interest was included in the amount due, could not confine their creditors to such rights as they would have had under the two mortgage contracts standing by themselves. They held that judicial proceedings did not require to be registered under Act III. of 1877, s. 17; and also that the Subordinate Judge was not justified in finding that an undue advantage had been taken of the mortgagors. They accordingly increased the amount payable for redemption to Rs.36,492 12*a*. 3*p*., taking as the basis of their calculation the sum of Rs.33,444 7*a*. 6*p*., which the mortgagors had admitted to be due on May 15, 1886.

The only plea urged for the mortgagors in support o' this appeal was that founded upon Act III. of 1877, which had been rejected by both Courts below. Their Lordships do not think that, according to the tenor of the mortgage deeds, it was intended that the capital sums should cease to bear interest upon the arrival of the time stipulated for their payment. The learned judges in the Courts below appear to have fallen into the error, which was corrected by this Board in *Mathura Das* v. *Rajah Narindar Bahadur Pal* (1), of confining their attention to a single passage, instead of taking into consideration the whole provisions of the deeds with respect to interest. In the present case, by the deed of August 21, 1875, the whole conditions and provisions of which are made applicable to both loans, it is stipulated in general terms that interest at Rs.18 per cent. per annum is to run upon the principal sums advanced, without any limitation as to the period of its currency. And it is also stipulated that, in default of punctual payment at the end of each year, the creditors are to be at liberty to treat interest as principal, and to recover it from the mortgaged property. It was therefore, in their Lordships' opinion,

(1) L. R. 23 Ind. Ap. 138.

unnecessary for the creditors, respondents in this appeal, to rely upon the admissions made by the mortgagors in the course of the foreclosure proceedings.

Although, in the view which their Lordships take, the question whether those proceedings can be founded on, without their having been registered in terms of the Act of 1877, does not necessarily arise in this appeal, they think it right to add that, having heard counsel fully upon the point, they are satisfied that the provisions of s. 17 of the Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties, or of orders made by the Court.

Their Lordships will, for these reasons, humbly advise Her Majesty to affirm the decrees appealed from, and to dismiss the consolidated appeals with costs.

Solicitors for appellant : *Barrow & Rogers.*

Solicitors for respondents : *Pyke & Parrott.*

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Nov. 11 ; *Dec.* 8.

PRINCE SULEMAN KADAR BAHADUR. PLAINTIFF ;

AND

NAWAB MEHNDI . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Ism farzi Transaction—Sale and Purchase—Onus probandi—Source of the Purchase-money.

The appellant being mortgagee of certain houses, his mortgagors executed a sale deed thereof to his wife, the respondent, which recited that they had received from her and paid to the appellant the full amount of mortgage money and interest, and had received a further sum of Rs. 250 :—

Held, that on the issue whether this deed was executed ism farzi in the name of the respondent the appellant being the real purchaser, the onus probandi was on the appellant, who claimed contrary to the tenor of the deed ; that proof by him of the real consideration having been the extinction

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* *Present* : LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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of the mortgage debt due to himself shifted the onus to the respondent of shewing that it was extinguished with her moneys, or that she had had continuous possession in accordance with the deed.

APPEAL from a decree of the Judicial Commissioner (Aug. 11, 1892) reversing a decree of the District Judge of Lucknow (April 12, 1890).

The appellant is a son of Muhammad Amjad Ali Khan, fourth King of Oudh, and is husband to the respondent. He sued for a declaration that a conveyance of certain property standing in her name was a benami transaction, and that the property was really his.

Upon the evidence the District Judge was of opinion that the plaintiff had made out his case: "No doubt defendant produced the mortgage deed, but it is in plaintiff's favour, and his evidence as above referred to shews that he found the funds. Defendant's story is not proved, and plaintiff has held possession of the property."

On appeal the Judicial Commissioner held that it lay upon the plaintiff (1.) to establish the benami character of the sale deed, and (2.) to shew that he had been in possession within twelve years. On the former point the Court disbelieved the evidence of the plaintiff and his witnesses, and relied strongly on the possession of the mortgage and the sale deed being held by the defendant. On the second point the Judicial Commissioner considered that the evidence of the plaintiff's possession was of the most flimsy kind, and that "on February 29, 1887, the plaintiff, when examined at great length as to his circumstances and means in a suit brought against him by the defendant for recovery of her dower, did not specify the property in suit among his assets."

C. W. Arathoon, for the appellant, contended that the onus did not lie entirely on him. The source of the purchase-money was the question at issue. There was no evidence that the respondent had any means, or that she had paid the purchase-money, or that she had had possession under her alleged purchase. The appellant had proved payment of the consideration by discharging the mortgage debt due to himself,

possession, and the reason for taking his conveyance ism farzi.

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Mayne, for the respondent, contended that the real consideration for the purchase was the extinction of the mortgage debt. The onus was on the appellant to prove where the money with which it was extinguished came from, for he claimed contrary to the tenor of the deed, and that onus ought not to be shifted to the respondent merely on the appellant's evidence. He referred to *Sham Lall Mitra* v. *Amarendronath Bose*. (1)

Arathoon replied, citing Act III. of 1877, s. 58.

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Dec. 8.

The judgment of their Lordships was delivered by

LORD DAVEY. The appellant is a son of the late King of Oudh. The respondent is his wife. They were living together in the year 1875, but in the year 1886 they separated, and they have since lived apart. By a mortgage bond dated May 10, 1870, two ladies mortgaged certain houses and lands to the appellant to secure Rs.8500 with interest at the rate of 8 annas per cent. per mensem for a stipulated period of five years. Nothing was paid by the mortgagors on account of either principal or interest, and on May 14, 1875, a sale deed of the mortgaged property was executed by the mortgagors whereby, after reciting the mortgage and that the mortgagors had not been able to pay anything up to date, and that according to accounts it appeared that they had then to pay to the appellant the sum of Rs.11,000 on account of principal and interest, it was witnessed that the mortgagors sold the mortgaged property in lieu of Rs.11,000 to the respondent, and that the mortgagors having received the purchase-money in full from the said vendee had paid it to the appellant in liquidation of the debt due to him under the deed of May 10, 1870. It appears from the indorsement on the sale deed that a further sum of Rs.250 was paid in cash to the mortgagors, and this sum seems to have found its way back into the hands of the appellant's then agent.

The question on this appeal is what the transaction recorded in this sale deed really was. The appellant contends that the

(1) (1895) Ind. L. R. 23 Calc. 460, 475.

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sale deed was executed ism farzi (fictitiously) in the name of the respondent, and that he was the real purchaser and assumed proprietary possession of the property comprised in the deed. The respondent, on the other hand, alleges that she purchased the property in suit with her own money, and has ever since been in adverse proprietary possession thereof.

The burden of proof is in the first place upon the appellant, who claims against the tenor of the deed. He states in his evidence that the consideration for the sale was the mortgage money plus interest, and the sum of Rs.250 which he says that he paid through his then agent, one Achche Sahib, and again that the mortgage money was not recovered in cash but formed part of the consideration. The substance of his evidence is that no money passed in the transaction except the Rs.250. He accounts for the production of the title-deeds by the respondent by saying that they were in the custody of Achche Sahib, who was formerly his agent but had been dismissed, and who was prior to and at the time of the suit acting exclusively for the respondent. He further says that Achche Sahib advised him to have the sale deed in the name of the respondent in consequence of some threatened litigation. The appellant's evidence is confirmed by that of Kirpa Ram and Maharajah Tej Krishna Sahib, who were relatives of the vendors and negotiated the transaction on their behalf. They both state that the consideration was not received in cash except as to the Rs.250 which was taken back from the vendor's agent by Achche Sahib, and that the sale deed was executed in the name of the respondent by the orders of the appellant. The evidence of the vendors, who were both purdah ladies, is less precise but to the same effect.

It is apparent from this evidence, and indeed it is not denied, that no money in fact passed from the nominal purchaser to the vendors, and from the latter to the mortgagee, and that the narrative of the deed is not therefore in accordance with the facts. The effect, and doubtless the object, of the deed is to make it appear that the consideration to the vendors for the sale proceeded to them from the respondent, so as to give her an apparent title for value, whereas the real consideration to

the vendors being the extinction of the mortgage debt, which was the property of the appellant, proceeded from him. Their Lordships think that this circumstance, and the other evidence of the appellant and his witnesses, are sufficient to call upon the respondent for an answer, and to shift the burden of proof upon her. This burden she may discharge by shewing that the purchase-money, though not paid by her to the vendors, was paid to the appellant out of her moneys, or by evidence of continuous possession in accordance with the deed. The respondent was called as a witness by the appellant. In her evidence she states as follows :—

"My husband told me that there was no use in keeping money ; that he had a house in mortgage which I should buy ; that it was very cheap ; that I will get rents ; and that it will be sold for Rs.11,000. I told him that he should speak to my aunt (Ammi Jan) ; if she accepts I will accept. The plaintiff then spoke to her, and she consented. Thereupon I also consented. Then the plaintiff told my aunt that the Rani's mokhtar had come, and if she (my aunt) gives the money, the plaintiff will make arrangements for the purchase. Thereupon my aunt sent Rs.10,000 in cash with the plaintiff, and asked Achche Sahib to send for the remaining Rs.1000 thereafter. This Rs.10,000 belonged to me, and was kept in deposit with my aunt. Then I sent Agha Nawab, my mokhtar, who got the deed executed. The plaintiff got the remaining Rs.1000 from Achche Sahib. The latter paid the money on my behalf, as my mother had told him to pay. Then Agha Nawab got the deed of sale duly executed and registered, and then gave over to me the said deed of sale as well as the mortgage deed. Agha Nawab took Rs.250 more from me, which he said the plaintiff had told him to pay to Kirpa Ram, mokhtar of the Ranis. Since purchase, the house in dispute has been all along in my possession. . . . The above facts were known to Agha Nawab, Mirza Muhammad Daroga, Achche Sahib, Saiyid Mustafa, and others whose names I cannot recollect. . . . When my aunt paid the money to the plaintiff I was sleeping ; when I got up my aunt told me that she had paid the money, and Taijan Mahaldar told me that she had carried the money

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with the plaintiff." Achche Sahib states he was told that Rs.1000 was short, and was asked to pay it, and paid it to Taijan Mahaldar ; and so far he confirms the respondent's evidence. He further states that he did not see the price, Rs.11,000, paid. Achche Sahib, however, was a dismissed servant of the appellant. He says he resigned the appellant's service because the appellant gave him orders to oppress the respondent ; and he is now the agent of the respondent, and was made a defendant in the appellant's suit for restitution of conjugal rights. The District Judge described him as "a most shifty and unsatisfactory witness." On the other hand, the respondent did not call as witnesses her aunt, her mother, Taijan, Agha Nawab, or Saiyid Mustafa, and there is no explanation of their absence. Nor were any questions addressed to the appellant in cross-examination with a view to shewing that money was paid to him by the respondent's direction or on her behalf. There is therefore no real corroboration of the respondent's evidence, and their Lordships cannot accept her evidence as reliable proof that any money was paid by her either to the vendors or the mortgagee on their account.

The evidence as to possession is vague and unsatisfactory on both sides. The balance perhaps inclines in favour of the respondent ; but, in the opinion of their Lordships, there is not such an amount of possession proved as to affect the question either way.

Their Lordships will therefore humbly advise Her Majesty that the order appealed from be reversed, and instead thereof an order be made dismissing the respondent's appeal to the Court of the Judicial Commissioner with costs. The respondent will pay the costs of this appeal.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondent : *Young, Jackson, Beard & King.*

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RAMPHUL DAS AND OTHERS . . . . . CAVEATORS. *July* 2, 6, 8 ; *Dec.* 10.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Will—Issue as to Forgery—Duty of Judge in respect to Evidence.

Case in which it was held, upon evidence which was very conflicting, in some respects obscure and unsatisfactory, and in reference to which the Court below had differed, that a Hindu will propounded by the appellant was genuine, and that the High Court was not justified in reversing a decree to that effect.

The duty of a judge in such cases is patiently to investigate the actua facts, placing himself as it were in the position of the alleged testator with all his actual surroundings ; not to approach the subject from the point of view of what a testator ought or would be likely to have done on some preconceived idea of Hindu usages and habits of thought

APPEAL from a decree of the High Court (July 10, 1894), reversing a decree of the District Judge of Gya (Nov. 11, 1893), which had granted to the appellant letters of administration with the will annexed to the estate and effects of the appellant's deceased husband Narain Das.

The facts are stated in the judgment of their Lordships.

Sir E. Clarke, Q.C., Mayne, and *Woodroffe,* for the appellant.
Asquith, Q.C., and *C. W. Arathoon,* for the respondent.

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Dec. 10.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The only question in this case is whether a certain paper writing, purporting to be dated May 18, 1893, and to bear the signature of Narain Das, who died on the following June 3, is his will or a forgery.

The instrument in dispute was propounded on June 9, 1893, by the appellant Dowlat Koer, who was living with Narain Das as his wife at the time of his death, and had lived with him for about twenty years on that footing, whether she was

* *Present :* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

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lawfully married to him or not. It was challenged at once by the three respondents, Babban Das, a younger brother of Narain Das, Uttim Koer, his mother, and Rajkali Koer, his wife, and his only living wife if Dowlat was not married to him.

After a trial which lasted fourteen days Mr. Brett, the District Judge of Gya, found for the will and decided in favour of the appellant, but refused her the costs of the suit on the ground that the will was not registered. On appeal to the High Court Mr. Brett's decision was reversed by Trevelyan and Ameer Ali JJ. They dismissed the appellant's petition with costs in both Courts.

In any view of the case there is much that is obscure and much that is unsatisfactory. But after carefully considering all the circumstances and giving due weight to the objections of the learned judges of the High Court, their Lordships have no hesitation in accepting the conclusion at which the District Judge arrived and pronouncing in favour of the will.

Narain Das seems to have been a little over fifty years of age when he died. He was a man of low caste—a Bari. At one time he was a table attendant of the Rani Asmed Koer. For some services to the Raja Run Bahadur, who became her heir, he was rewarded by valuable mokurruri grants, and thus acquired a good deal of property. When in the service of the Rani he formed a connection with Dowlat Koer, a maidservant in attendance on his mistress, and then a young widow. Dowlat Koer says that Narain Das married her in privacy according to the simple rites of the "Sagai" ceremony. The respondents represent her as merely a concubine discarded in favour of the lawful wife. The District Judge thought the weight of evidence was in support of Dowlat's contention. Their Lordships agree with him in this. It seems more probable that there was a marriage between Narain and Dowlat than that there was not. The point, however, is not very material. Nor is it material to inquire whether Narain's connection with Dowlat when it first began preceded or followed his marriage with Rajkali. There, again, if it were necessary to come to a conclusion, their Lordships would be disposed to agree with the District Judge, who does not seem to have fallen into the error

attributed to him by the High Court of mistaking dates by confusing the younger Rani with the elder. Be that as it may, it is quite plain that Dowlat was not abandoned for Rajkali. For many years and down to Narain's death Dowlat was the favourite, and her influence with him seems to have been paramount. He had no issue. Rajkali and Dowlat were both childless, and so was his first wife, who died before he married Rajkali.

Narain had two houses within the inclosure known as the Fort of Tikari. They stood about 400 yards apart. One is spoken of as the north house, the other as the south house. The south house, according to the District Judge who inspected both, is in every way the larger, the more convenient, and the better built of the two. It was bought in Dowlat's name and rebuilt by Narain for her accommodation. "After he had made a fine place of it," says one of the witnesses for the respondents, "he put Dowlat into it." In this house Narain lived with Dowlat and her nephew Tunu, who was Narain's treasurer or cashier, and her brother Chhedi, who used to be addressed by Narain as "Chhedi Bai," or "brother Chhedi." Narain's office was there. There he kept all his valuables, his deeds, his money, and his jewels, and there the customary nuzzars, or complimentary offerings, were presented in his honour. The north house was a humbler edifice, and maintained on a poorer scale. It was occupied by Uttim and Rajkali and Babban and Babban's two wives. "In the north house," said Babban in cross-examination, "we got no fixed monthly allowance from Narain; but I should say he sent us at the average Rs.50 a month. His net income was say Rs.20,000 a year."

It is common ground that Narain's illness lasted five or six months. Though he seems to have been confined to the house during the greater part of that period, and though he was gradually getting worse, it is not disputed that he was perfectly competent to dispose of his property at the time when he is said to have made his will. In fact he did not become insensible until the last few days, or, as Babban says, the last few hours, before he died.

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In these circumstances, if it could be shewn that Narain was minded to settle his affairs before his death or willing to face the question at all, one would certainly expect to find provision made for Dowlat Koer and her relations. They seem to have held the first place in his affections. At any rate they were about him during his long illness. They must have foreseen the end. They were hardly likely to be indifferent to their own interests, or to shrink from pressing their own claims and disparaging the merits or exaggerating the faults of absent rivals. On the other hand, the inmates of the north house for all practical purposes were out of sight. What amount of intercourse there was between the north house and the dying man it is impossible to say. It is admitted that Uttim often came to see Narain during his last illness. Rajkali came but once, if Dowlat and Tunu are to be believed. Dowlat speaks of one visit by Babban and Rajkali. She puts the date of that visit "soon after the deed to Tunu," which will be mentioned presently and which was dated April 28, 1893. "They remonstrated with Narain," says Dowlat, "for alienating this property to my relations. They spoke contemptuously of me. This led to the interchange of abuse, and they left in anger." Tunu also says that Rajkali came once to complain, and that Narain's reply was this: "All the property is mine to deal with as I like." On this part of the case unfortunately no help is to be got from the other side. They pretended that Narain never ceased to live with the inmates of the north house. Uttim and Rajkali and Babban, too, in his examination-in-chief, say that Narain lived continuously at the north house, that he fell ill there, that about two months before he died they took him to the south house for change of air, and migrated with him in a body. "We all stayed there," says Rajkali, "till the death of Narain, and then we said, 'Let us go and worship at the house where our family gods are' "; and so they all migrated back to the north house on the following morning. The District Judge, who examined the ladies himself, had no difficulty in rejecting this story as an impudent attempt to impose upon the Court. It is shewn to be untrue by the ignorance which Uttim and Rajkali both displayed about the

south house. "I do not believe," says Mr. Brett, "they were there at all." It is disproved by entries in the accounts and by Babban's own admissions on cross-examination. It is directly contradicted by a petition signed and presented by Babban himself on May 28 asking for the intervention of the police to prevent Dowlat and her relatives despoiling the south house on Narain's approaching death. Narain Das, it is stated in the petition, "has been ill in his residential house for the last five or six months. Now he is becoming worse, and there is no hope of his life; he may die to-day or to-morrow. Babu Narain Das has a kept woman, who lives along with her brother and sister's son with the said Babu Saheb."

About six weeks before his death Narain made a partial disposition of his property. The evidence does not explain what led him to do so. But the fact is undisputed, and not unimportant.

On April 21, 1893, he executed in favour of Chhedi a permanent and heritable mokurruri lease of a mouzah producing according to Babban a net annual profit of Rs.600, a sum just equal to the annual allowance he was making for the north house. The lease was duly registered on the 23rd by the sub-registrar, who attended at the south house for the purpose.

On April 28 Narain executed in favour of Tunu a permanent and heritable mokurruri lease of a mouzah called Khurey, producing according to Babban a net annual profit of Rs.3000. It was duly registered on the 30th. This lease as originally drawn and executed was in favour of Dowlat. It was intended to have the document in that form registered at the same time as the lease to Chhedi. A petition stating its execution and asking the sub-registrar to attend for the purpose of registering it was presented on the 22nd, together with a similar petition relating to Chhedi's lease. But when the sub-registrar came he was asked to postpone the registration of the lease of Khurey, on the ground that some alteration was required and the writer of the deed was not present. A petition was then put in stating that only one deed was ready, and so only the lease to Chhedi was registered on that occasion. So far there is no dispute. There is a conflict of evidence as to the reason for not

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completing the registration of the lease of Khurey as originally drawn. Babban says he was told "one afternoon" when he was in the north house, "about six weeks before Narain's death," that one "Gur Sahai had come from Gya with a lease." "I went over," he adds, "to see what was up. I saw my brother and Gur Sahai and Tunu and others. I asked Narain what he was doing. He said, 'I am giving a life lease of Khurey to Dowlat.' She was on one side. He commenced to sign his name. He had got half through the signature when Gur Sahai said the deed was hereditary. Then Narain refused to sign and flung the paper down." Dowlat's account of the transaction is this: "Narain was ill," she says, "five or seven months. After he got ill he gave a lease to my brother Chhedi and to Tunu my sister's son. To Tunu he gave the lease of Khurey. He had intended to give me the lease, perpetual lease. This was written out, but I refused. I said, 'You give one village to Chhedi and want to give one to me; what is to become of the rest?' He said, 'I will give the rest to Tunu.' I said, 'No, give Khurey to Tunu and give me the rest.' He consented. The lease to me was destroyed, and Khurey was leased, perpetual lease, to Tunu eight days afterwards." Babban's story cannot be true. It is extremely improbable; the lease to Chhedi and the lease to Dowlat were both prepared on Narain's written instructions; the lease given to Chhedi was hereditary; the lease given afterwards to Tunu was hereditary too. But, apart from the improbability of the story, it will be observed that there is no room for the incident described by Babban. It could not have happened on the 21st, for the petition of the 22nd, asked the sub-registrar to come over, states that the lease was executed. It could not have happened on the 23rd. Babban says it was in the afternoon that he went over to see what was up. But the sub-registrar, who is above all suspicion, and who was called for the respondents, after stating that on April 22 two petitions were put in to him to go to Tekari "to register two deeds executed by Narain Das," says, "I went on April 23, arriving there very early; it was the hot weather. I saw Narain. He had two deeds. But he apparently wished to amend one, but could not find the writer."

Dowlat's account may be true. To a certain extent she is corroborated by Babban himself. After stating that Khurey was afterwards given as a hereditary lease to Tunu, he adds, "This was on the advice of Dowlat Koer." Whether Babban had any special reason for saying so or not the statement is a remarkable tribute to the influence which Dowlat had over Narain.

Putting aside the visit of Rajkali and Babban to complain of alienations of property in favour of Dowlat's relations (if the visit really took place), the evidence is a blank as to what occurred between the date of the gift to Tunu and May 18, the date of the alleged will. Dowlat Koer says that between the date she refused the lease and the date the will was given she had no talk about the will with her husband. She felt sure, she says, that he would do what he promised. Her reticence on the subject of the will during the period in question was naturally commented upon by the learned counsel for the respondents. It is certainly a matter for observation. But it does not go very far. It is possible that Dowlat's story may be true throughout. It is at least as possible that it may be true in the main, though she may have deviated from the truth in her anxiety to make out that Narain was ready to fulfil his promise of his own free will and without any pressure from her.

The document put forward as Narain's will and the fulfilment of his promise to Dowlat is simple enough in its dispositive clauses. His entire property is left to Dowlat Koer absolutely subject to the payment to Uttim and Rajkali each of Rs.25 a month.

The document purports to bear the signature of Narain Das and the signatures of twelve witnesses, including the writer.

No one comes forward to say that Narain's alleged signature is not his own handwriting, and yet his handwriting must have been well known to some of the persons who were witnesses for the respondents. The District Judge notices the point, but observes that it may have been an accidental omission, and says that he does not wish to lay too much stress upon it. The omission, however, acquires much greater significance from what

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took place in the Court of Appeal. One of the learned judges in the High Court was familiar with the native character, and evidently not disposed to overlook the assistance to be derived in such a question as this from a comparison of handwriting. He scrutinized the signatures appended to the document in question. He saw, or thought he saw, some indication tending to shew that the signatures had not all been written at the same time. He compared the signature of one witness with a signature which that witness subscribed to his deposition in Court, and came to the conclusion that the two signatures were not made by the same person. But as to the signature of Narain Das he says nothing, although he had actually before him in documents put in evidence signatures of Narain which were unquestionably genuine.

The alleged writer of the will was one Sheo Pershad, a young mokhtar. It seems that in May, 1893, there was a local investigation going on in regard to some litigation in connection with a village called Paluhan, which was situated about two miles from Tikari. A number of lawyers and others concerned in the inquiry were gathered together at Tikari. Among them came Sheo Pershad and Sheo Sahai, another young mokhtar. They put up in the same house at Tikari. They were old acquaintances, they said, of Narain. They heard he was ill and went to see him on the 12th. On the 16th he sent for them and consulted them about making over his property to Dowlat Koer. At first a deed was suggested, but the amount of the stamp duty seemed a formidable objection, and so after some discussion they advised a will. He told them how he wished to dispose of his property, and they prepared a draft from his verbal instructions. It was their joint production. They left the draft with Narain that evening. On the evening of the 18th they were summoned again to Narain's house in order to complete the transaction. Sheo Pershad "faired out" the draft. Witnesses were collected and the will was duly executed. They both saw Narain execute it, and they both attested his execution. That was their story. Of the other ten seven deposed to seeing Narain sign the will. They signed as witnesses and saw the other witnesses sign. That leaves three

of the alleged witnesses to be accounted for. One was absent from illness. The remaining two were Kali Churn and Bankey Behari, a young pleader in the Gya Court whose name on the will appears in English with the word "witnessed" also in English before it. Kali Churn was summoned as a witness by the petitioner. He evaded service, and then was arrested. When he was brought into court neither side would call him. He was called by the judge. He said the writing of his name on the will resembled his but was not his, and he tried to make out an alibi. The judge did not believe the alibi and thought his evidence of no weight. Bankey Behari was also distrusted by both sides and called by the judge. He admitted that one day just after the application for probate when he was in the Bar Library he was taxed with having signed Narain's will, and that he did not deny it directly. What he said was, "As far as I recollect I have not signed any will." "Those," he adds, "were the words I uttered. I meant to absolutely deny my signature. But I did not say that I had never signed." Before Mr. Brett he was more positive and more intelligible. He declared that his name on the document in dispute was not his signature. "My signature," he said, "has been forged." To some extent, however, his evidence curiously corroborates the appellant's case. He admits that on the evening of May 18 somebody came to him and said Narain wanted him. "The messenger," he says, "told me that Narain Das had heard I was in Tikari and that others were with him, and he wanted to see me as he was ill. He said perhaps that the men were writing something." "My grandfather," he said in another part of his evidence, "was a pleader of the Raj and Narain Das had been an influential servant, so it did not strike me as peculiar that he sent for me." All this is entirely in accordance with the story told by the witnesses for the appellant. As to what followed there is a direct conflict of evidence. The appellant's witnesses say Bankey Behari obeyed the summons and witnessed Narain's will. He says he "was tried and did not go," shewing, as the judge thought, an indifference to his professional prospects remarkable, to say the least of it, in so youthful practitioner. The District Judge in whose Court he practises

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did not believe him. The High Court did. They found no resemblance between the signature he made at the foot of his deposition in court and the signature shewn to him a few minutes before and denounced by him as a forgery. They seem to have thought a difference in the handwriting at that critical moment conclusive in his favour. Moreover, they thought the writing on the will "an unformed writing like that of a schoolboy" —the signature "of a beginner just learning to write," while the signature on the deposition was "in the running hand of a person much accustomed to writing in English." On the other hand, the District Judge observes that the words on the will "have a genuine look about them . . . . they do not look like an imitation." Their Lordships have had the will before them. So far as regards the character of the writing they are unable to agree with the learned judges of the High Court. No fault is to be found with the signature. It seems to be written boldly, and would pass for the writing of a well-educated English gentleman.

It is unnecessary to discuss in detail the evidence of the witnesses for the appellant. The District Judge has gone through it very carefully, noticing apparently everything that struck him as suspicious in statement or demeanour. On the whole he came to the conclusion that there was no sufficient reason for refusing credence to the appellant's story. One circumstance may be noticed in passing which in the view of Trevelyan J. tells strongly against the appellant, while the District Judge thinks it throws no light on the case. It is this: Narain's accounts were kept by Tunu. The accounts for the last year are missing. If they had been forthcoming and if they could have been trusted they might have been useful in clearing up some disputed points. The absence of these accounts gave rise to a good deal of argument before the District Judge. But he was, he says, "unable to form any definite opinion as to the question as to on whom the disappearance casts suspicion." Trevelyan J. felt no difficulty on that score. "There is," he says, "no doubt to my mind that this book can only have been kept back by Dowlat's party." And then he proceeds to draw the inference which suppression

of evidence invariably suggests. Their Lordships do not think it by any means clear that Dowlat's party ought to be held accountable for the non-production of the last year's book of accounts. At any rate, it is obvious that an unscrupulous man concerned in forging a will would not scruple to manipulate accounts for his own purposes if he thought he could do so without fear of detection. As the whole book was written up by Tunu, there would be no difficulty in his replacing an incriminating page by a new leaf with all necessary entries to confirm his story. It is difficult to see why Tunu should have suppressed a piece of evidence which he might so easily have made to serve his purpose.

The District Judge and the learned Judges of the High Court both deal with the main question at issue on a broad view of the whole case. It is little wonder that they come to opposite conclusions, for they approach the matter from very different points of view. Patiently and with every appearance of impartiality the District Judge sets himself to investigate the actual facts. He tries to place himself in the position of the alleged testator with all his actual surroundings. On the other hand, Ameer Ali J., who claims to be intimately acquainted with the usages and habits of thought of his Hindu fellow-countrymen, though not himself, it may be presumed, a member of their community, approaches the question from the point of view apparently of a pious Hindu gentleman, scrupulous and exact in the discharge of every moral and religious duty—so scrupulous indeed and so exact that, in the opinion of the learned judge, it becomes a matter of grave importance that no provision is to be found in the will for the worship of a family idol whose worship, as it appears, was maintained during the testator's lifetime by the annual expenditure of the sum of one rupee. Tried by so high a standard, the will is found wanting in many things. But for all that it is not an unlikely disposition for such a man as Narain Das to have made under the circumstances. As regards the monthly allowances to Uttim and Rajkali, it will be observed that the aggregate of the two allowances is precisely the sum which Narain had been in the habit of providing for the maintenance of the north house.

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And it is perhaps remarkable that the allowance to Uttim, which seems to the High Court so niggardly as to throw doubts on the genuineness of the will, is the exact amount which Rajkali and Babban allotted to her when they assumed to divide the inheritance between them on July 6, 1893, under a deed of compromise.

The learned judges of the High Court have embarked upon an inquiry as to the truth of the charges against Rajkali and Babban contained in the introductory part of the will. Their Lordships cannot think that the inquiry is much to the purpose. There is certainly no evidence in support of these charges. But in estimating their value and importance one cannot help seeing that something must be attributed to the zeal of the two young mokhtars, who would probably exert all their skill to amplify and embellish whatever Narain may have said in disparagement of those whom he proposed to disinherit. Something, too, may be due to the ill-feeling between the inmates of the two houses, which must have been tolerably bitter if one is to judge from the steps which Babban thought fit to take against Dowlat when Narain lay a-dying. Whatever the will may say to the discredit of Babban, all that seems to be alleged against Rajkali is ill-temper coupled with disobedience. We know that Narain preferred living with Dowlat, whatever the reason was. The will hints at " several other reasons" —a suggestion one would think too vague to be taken seriously. But in its vague generality Ameer Ali J. finds a deep meaning. He has no doubt that those apparently innocent words were intended to convey " an insinuation of unchastity." It is obviously quite impossible to accept that construction on the faith of a statement, whatever may be its source or apparent authority, which the appellant had no opportunity of meeting by direct evidence or testing by cross-examination. In the Court of First Instance, as far as we can see, the point was not even suggested. It is not alluded to in any one of the twenty-seven reasons set forth in the memorandum of appeal, and certainly it is satisfactory to find that it escaped the notice of Rajkali and her advisers. In her petition of objection put in on July 14, 1893, she alleges that " several

of the statements made in the alleged will are false." She avers that she " was never disobedient to her husband, nor was he ever displeased with her " ; but she makes no reference to the imputation of unchastity, which she naturally would have resented if she had supposed that the will contained any insinuation of the sort. In the course of the litigation and at the trial the appellant certainly made a direct charge of unchastity against Rajkali—a charge for which there appears to have been no foundation whatever. But it would be a mistake to connect that charge with anything in the will. It seems to have been provoked by the attacks which Babban and Rajkali made on the appellant at the time of Narain's death. Insulted as she was, and treated with great cruelty, it is hardly surprising that Dowlat Koer should attempt to retaliate with any weapon she could think of.

Some minor points were pressed. There was the non-registration of the will—due perhaps to Narain's state at the time. Then it was said that the witnesses to the will were in social position inferior to the persons who attested the lease to Chhedi and the lease to Tunu. That may be accounted for by the circumstances under which the will was executed, and after all the inferiority may not have been so great as it was represented. At least, we find that one of the witnesses to the two leases, who is described as a " rais" or " big man," says of himself, " my profession is service but I am not in any employ." Then it was pointed out that the witnesses to the will were, on their own shewing, singularly reticent as to the transaction in which they say they were engaged. So they were, and this reticence is one of the difficulties in the case. But even here the evidence is not all one way. Sheo Pershad, for example, says he told some mokhtars. Among others he says he told Gopal Lal, whom he pointed out in court. About May 23, he says, he told him that Narain Das was ill and had made a will. Now Gopal Lal seems to have been an adherent of Babban, and to have been the writer of the deed of compromise between Babban and Rajkali which has already been mentioned. And he was not called to contradict Sheo Pershad's statement.

It is not necessary, however, to discuss these points further.

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On a review of the whole case, their Lordships are of opinion that the appellant has established the genuineness of the will, and that the High Court were not justified in overruling the decision of the District Judge.

Their Lordships will therefore humbly advise Her Majesty that the decision of the High Court ought to be reversed with costs and the judgment of the District Court restored. The respondents will pay the costs of the appeal.

Solicitor for respondent : *H. G. Dallimore.*

Solicitors for appellants : *T. L. Wilson & Co.*

J. C.* 1897 — *Nov.* 17; *Dec.* 8. —

ROBERT SKINNER (*alias* SARDA MIRZA) AND OTHERS . . . . . } DEFENDANTS;

AND

CHARLOTTE SKINNER (*alias* BADSHAH BEGUM) . . . . . } PLAINTIFF.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

Christian Marriage followed by Mahomedan Marriage—Rights of Spouses—Personal Status—Rights of Widow under Mahomedan Law—Divorce.

In a suit to obtain a widow's share under Mahomedan law in the estate of the deceased, it was proved that the plaintiff and deceased had been married in 1855 as professing Christians in a church at Meerut; that subsequently, having reverted to Mahomedanism, they were married a second time according to Mahomedan law in nikah form, which second marriage had not been dissolved by a Mahomedan divorce :—

Held, that the personal status of the deceased being at the time of his death that of a Mahomedan, and the plaintiff's personal status being that of his wife under the same law, she was entitled to a share in his estate, notwithstanding his will, which purported but under Mahomedan law was inoperative to exclude her.

Quaere, whether, in the case of spouses remaining domiciled in India, where religious creed affects the rights incidental to marriage, such as that of divorce, a change of religion made honestly after marriage with the assent of both spouses, without any intent to commit a fraud on the law, effects any change in those rights.

APPEAL from a decree of the Chief Court (July 12, 1893), which after remand affirmed a decree of the District Court of

**Present* : LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

Delhi (June 25, 1889), directed a partition of the estate in suit, and delivery of possession to the respondent of her share therein as one of the two widows of the deceased proprietor, Stuart Skinner.

The facts are stated in the judgment of their Lordships.

The District Judge found in favour of the genuineness of Stuart Skinner's will, but did not go fully into the evidence of divorce. He held that there was a valid Christian marriage; that the return of the plaintiff and Stuart Skinner to Mahomedanism did not dissolve the Christian marriage; that the nikah marriage ceremony performed between the parties was a mere empty form, and had no effect on the pre-existing rights of the parties, and that Stuart Skinner acquired no right thereby to divorce plaintiff and dissolve the Charistian marriage, and plaintiff no right to dower. That the loss of the dower deed was not proved, and therefore secondary evidence of the amount specified therein was not admissible; that the will was duly executed; but as Stuart Skinner, after the nikah ceremony, had continued to live as a Mahomedan, and died professing that faith, he was bound by the provisions of that law as to the will, according to which it was clearly invalid.

The Chief Court on April 1, 1891, remanded the case for completion of evidence on the issues which related to divorce, the alleged re-marriage of the respondent, and dower.

On June 22, 1892, the District Judge found in favour of the dissolution of Stuart Skinner's marriage with the respondent; that it was "conclusively shewn that he had had nothing whatever to do with her since some time prior to 1865, and that he has in no way supported her from the time in 1866 that he secured the custody of his daughter." He also found that it was not proved that any nikah ceremony had passed between the respondent and Abdul Wahid.

According to the final decision of the Chief Court, "it is now admitted by the plaintiff that her claim rests only on Mahomedan law, and not on English law; and this is accepted by the defendants. It is further admitted by the defendants that if it be found as a fact that the plaintiff at the time of the death of the deceased was his wife—that is to say, had not been

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divorced by him—the decree of the Lower Court is not open to exception." The Chief Court then found on the evidence that it was not proved that the plaintiff had been divorced by her husband at any time after the marriage, and consequently remained his wife at the time of his death.

C. W. Arathoon, for the appellants, contended that on the evidence the District Judge was right in finding that the respondent had been irrevocably divorced according to Mahomedan Law by Stuart Skinner; and that accordingly she had no claim to her share in his estate, and no right to contend that his will was invalid as against her. Reference was made to *In re Ram Kumari* (1); *In re* ———, Proceedings on Appellate side (2); *In re Millard* (3); Indian Marriage Act, 1852; *Moonshee Ruzul ul Raheem* v. *Luteefoonnissa* (4); Ameer Ali's Personal Law of the Mahomedans, pp. 344, 347; Baillie's Digest, 205; Macnaghten's Mah. Law, p. 59; Hedaya, vol. i. bk. 4, c. 2; *Syud Mozuffar Ali* v. *Musst Kumurunnissa Bibi.* (5)

The respondent did not appear.

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The judgment of their Lordships was delivered by

LORD WATSON. Stuart Skinner, otherwise known as Nawab Mirza, was, on May 3, 1855, married to the respondent, who was the daughter of one Martin Blake of the Bengal Civil Service by a Mahomedan woman, Choti Begum. The ceremony was performed in the Protestant church at Meerut by the Rev. J. E. Wharton Rotton, the resident chaplain. It appears that the spouses were originally adherents of the Mahomedan faith; and that, in order to validate the marriage which they contemplated, they had previously become professing Christians, the respondent having been baptized at Delhi on April 18, 1855, and Stuart Skinner, at Meerut, on his marriage day. Some time after the marriage, but not later than the commencement of the Mutiny in 1857, both spouses reverted to their original

(1) (1891) Ind. L. R. 18 Calc. 264.
(2) (1866) 3 Mad. H. C. R. Appendix, vii.
(3) (1887) Ind. L. R. 10 Mad. 2, 18.
(4) (1861) 8 Moore's Ind. Ap. Ca. 395.
(5) (1864) Suth. W. R. 32.

creed ; and, although they did not cohabit after the year 1859, they both continued in the practice and profession of the Mahomedan faith until the death of Stuart Skinner, which took place at Delhi on January 29, 1886.

After their Christian marriage the spouses went through the form of marriage a second time, according to Mahomedan law. The precise date of the ceremony is not satisfactorily fixed by the evidence ; but it must have been shortly after the time when they reverted to Mahomedanism. In the year 1859, in consequence of domestic unpleasantness, occasioned by the circumstance that Stuart Skinner suspected his wife of having illicit intercourse with one Abdul Wahid, it is a fact proved beyond dispute that the respondent left his house and never returned to it. She stayed at first with her mother, and subsequently went to live with her alleged paramour, Abdul Wahid, to whom she bore several children. Before their separation two children, a son and a daughter, whose legitimacy is not impeached, had been born of the marriage between her and Stuart Skinner, both of whom survived their father.

In the month of May, 1871, Stuart Skinner began to cohabit with Sophia Skinner, daughter of one Thomas Skinner, whom he treated as his wife, and with whom he continued to live on that footing until his decease in January, 1886. He was survived by six children born of that intercourse, by whom the present appeal has been brought.

This suit was commenced in May, 1888, sixteen months after the death of Stuart Skinner, by Charlotte Blake, alias Badshah Begum. In her plaint Badshah Begum set forth their Christian marriage, and also alleged that " shortly after the said marriage the plaintiff and Nawab Mirza were again married at Delhi according to Muhammadan law, as Sunnis, and the plaintiff's dower was fixed at Rs.50,000." She further averred that she and the deceased "lived together as husband and wife according to Muhammedan creed." Her claim was alternative, being for one-third of the deceased's estate according to the English law of inheritance, or otherwise for Rs.50,000 as dower and one-eighth of the remaining estate according to Mahomedan law. The parties called by her as defendants were the two children

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born by her to the deceased during their cohabitation, and the six appellants, whom she described as being "looked upon as the heirs of Nawab Mirza, and entitled to succeed to the estate left by him." The plaintiff at the beginning of the litigation disputed that there had been any marriage between the deceased and Sophia Skinner, and the legitimacy of their offspring; but that contention was ultimately abandoned. By order of the District Judge of Delhi, before whom the action depended, Sophia Skinner was added as a defendant.

None of the defendants lodged written pleadings; but they appeared by their vakeels before the District Judge, who made a note of the pleas orally stated in defence to the action, with a view to the adjustment of issues. The main pleas stated for the present appellants were to the effect (1.) that the plaintiff was not, at the time of his decease, the wife of their father Stuart Skinner, she having been divorced by him according to Mahomedan law about the year 1859; and (2.) that the deceased had left a last will, by the terms of which she was in any event excluded from his succession. The plaintiff, in replication, denied the execution of the will, and also contended that, assuming the will to have been executed with due formality, it was in law inoperative.

The learned judge having adjusted thirteen issues which it is unnecessary to notice in detail, intimated to the parties at the close of the plaintiff's evidence that he would only take evidence from the defendants as to the factum of the will set up in answer to the plaintiff's claim, and then hear arguments upon the law points, when, if necessary, he would call upon the defendants to produce their remaining evidence. The effect of that order was to limit the evidence of the defendants to the ninth issue: "Did Stuart Skinner execute a will excluding plaintiff?"

When the evidence of the defendants bearing upon the factum of the will was concluded, the District Judge heard parties and gave judgment upon June 25, 1889. He found that the Christian marriage of 1855 was valid and binding upon the parties; and he also held that the subsequent return of the spouses to Mahomedanism did not give the husband any right to dissolve

that marriage by a divorce according to Mahomedan law. He found in fact that the will put forward by the defendants had been duly executed by Stuart Skinner; but he held that it was in law inoperative, because it was admitted on both sides that Stuart Skinner, after the nikah or second marriage ceremony with Badshah Begum, "continued to live as a Muhammadan, and died professing this faith." The learned judge adds that, in the matter of his will, "Stuart Skinner was bound by the provisions of the Muhammadan law, and according to that law it was clearly invalid." Upon the assumption on which it proceeds, the Mahomedan law laid down by the learned judge appears to their Lordships to be correct, and no attempt was made by the appellant's counsel to impugn it. Upon these findings a decree of partition was given to Badshah Begum, which assigned to her, as one of the two legal wives of the deceased, one-half of the eighth share allotted to the widow, or widows as the case may be, under the Mahomedan law of intestacy.

Against that judgment, cross-appeals were taken to the Chief Court of the Punjab; and, on April 1, 1891, Sir Meredyth Plowden and C. A. Roe, Esquire, remanded the case to the District Judge, under s. 566 of the Civil Procedure Code, directing him to proceed with the trial of the 6th, 7th, and 8th issues which he had framed, and to report the evidence and his findings thereon. The issues thus sent back were: (6.) Did he (i.e., Stuart Skinner) in fact divorce her (i.e., Badshah Begum), and when? (7.) Subsequently did plaintiff re-marry, and when? (8.) What was plaintiff's dower on nikah with Stuart Skinner? In obedience to the remand, the District Judge took evidence bearing upon these issues, which he returned to the Court, along with his findings, upon June 22, 1892. Upon the 6th issue, his finding was that Badshah Begum had been divorced, according to the form prescribed by Mahomedan law, some time before 1865; upon the 7th issue, that Badshah Begum lived with Abdul Wahid as his wife, but that there was no evidence to shew that they had contracted a Mahomedan or nikah marriage; and, upon the 8th issue, that, on the plaintiff's nikah marriage with Stuart Skinner, her

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dower was fixed at Rs.50,000, such finding being subject to those qualifications, (1.) that it was questionable whether the spouses, in going through the ceremony of a nikah marriage and fixing the dower at Rs.50,000, considered it more than an empty form, and (2.) that it was "subject to the plaintiff's right to give secondary evidence of the contents of the deed of dower, which up to this date has not been produced."

The case was finally disposed of in the Chief Court of the Punjab, on July 12, 1893, by the same learned judges who had made the remand. Their decree simply affirmed the original decree of the District Judge, and ordered the parties to bear their own costs of appeal. In arriving at that result, the learned judges expressed no opinion in regard to the finding of law by the District Judge in his original judgment of June 25, 1889, to the effect that the fact of the spouses having returned to their Mahomedan faith after the Christian marriage of 1855 did not give Stuart Skinner any right to dissolve that marriage by a Mahomedan divorce; but they reversed the later finding of the District Judge to the effect that there had been such a divorce. They agreed with him in holding, first, that, in the absence of secondary evidence of the contents of the deed of dower alleged by her, the plaintiff's claim for dower must fail; and, secondly, that the defendants had failed to prove their allegation that Badshah Begum had married Abdul Wahid during the lifetime of Stuart Skinner.

The decree made by the District Judge, and ultimately approved of by the Chief Court, is framed upon the footing that the personal status of Stuart Skinner, at the time of his death in 1886, was that of a Mahomedan, and that the rights of succession to his estate, including the right of his first wife, who had become and was then a Mahomedan, were governed by the rules of Mahomedan law. But the grounds upon which the two Courts came to the conclusion that Badshah Bagum continued to possess the status of a wife of the deceased were essentially different. Whilst the District Judge held, as a matter of law, that the regular Christian marriage, celebrated between two persons domiciled in India, could not, upon the spouses subsequently embracing and professing Mahomedanism,

be dissolved by a Mahomedan divorce, the learned judges of the Chief Court were of opinion that, as matter of fact, there had been no Mahomedan divorce, as alleged by the defendants.

One of the many peculiar features of this suit arises from the circumstance that, in the case of spouses resident in India, their personal status, and what is frequently termed the status of the marriage, is not solely dependent upon domicil, but involves the element of religious creed. Whether a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of divorce, is a question of importance and, it may be, of nicety. In the present case that question does not arise for decision, unless it is shewn that Stuart Skinner did, in fact, divorce Badshah Begum according to Mahomedan form.

On the hearing of this appeal, which was ex parte, the appellants' counsel did not challenge any finding of the Courts below, with the exception of that of the Chief Court which negatives the fact of divorce. Upon that part of the case, their Lordships, after careful consideration of the evidence, which is not only contradictory, but is marked by peculiarities which are more perplexing than mere contradiction, have come to substantially the same conclusion with the learned judges of the Chief Court. In these circumstances, and having regard to the fact that the case has come before them in such a shape as to make an exhaustive argument from the Bar on both sides of the question impossible, they do not think it expedient to express any opinion as to the effect of a change of religion by the spouses, their domicil remaining the same, upon the rights of one or other of them which are incidental to marriage.

The bulk, and that not the least important part, of the evidence adduced in this case bearing upon the fact of divorce consists of legal proceedings between the respondent Badshah Begum and the deceased Stuart Skinner, including depositions of witnesses taken in those proceedings. The difficulty, to say the least of it, of estimating the value of that evidence for the purposes of the present case is occasioned by the fact that in all these litigations the respondent alleged and endeavoured to

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prove that she had been divorced about the year 1859, whereas the deceased alleged and endeavoured to prove that she had not. Accordingly, in the present suit, the appellants found upon the statements made and proof led by the respondent, whilst she herself relies upon the statements made and proof led by Stuart Skinner, which she had controverted. It appears to their Lordships that these proceedings would have been insufficient to raise an estoppel, either against the respondent or against Stuart Skinner, in any question between them as to their status; and, in the argument upon this appeal, it was, in their Lordships' opinion, rightly conceded by the appellants' counsel that the respondent was not estopped from maintaining that she never ceased to be the wife of Stuart Skinner, and that the question must now be decided upon the weight of the evidence before the Court.

The first of these proceedings (Suit No. 257 of 1865) was instituted by the respondent against Stuart Skinner and the official trustee, who held certain funds in which the respondent and her children were interested. The immediate cause of action was the refusal of Stuart Skinner to sign papers to enable the respondent to obtain payment of interest on those funds to which she was entitled. The case was settled by a judgment adjusted with consent of the parties, in which, notwithstanding the respondent's contention that she had been divorced, Stuart Skinner is described as "her husband."

The second (Suit No. 33 of 1868) was brought against the respondent, and also against Stuart Skinner, by Sophia Skinner, an infant, the legitimate daughter of their Christain marriage, and one John Van Cortland, as her next friend, for the appointment of a guardian to the infant. Stuart Skinner, who by the consent decree in the previous suit had become bound to give the custody of the infant to the respondent, was the real instigator of the action, in which he repeated the allegation that the respondent was his wife, whilst she denied it. The suit was dismissed, with costs against both parents.

The third of these proceedings was an action brought by Stuart Skinner, in the year 1881, against Mrs. W. Orde and others, for the purpose of establishing his own legitimacy, and

so proving his title to the share of an estate. The respondent was not a party to the suit, but she was examined as a witness on behalf of Stuart Skinner, when she again took the opportunity of stating that she had ceased to be his wife by reason of his divorce.

There is, in their Lordships' opinion, an entire absence of facts established by reliable evidence available for the purpose of testing the accuracy of the counter statements made in the course of these proceedings by the respondent and by Stuart Skinner respectively. The only facts which appear to them to be proved are these: That about 1869 there were dissensions between the spouses in consequence of which the respondent left her husband's house, and never returned to it; that after, if not before she left, the respondent did not lead a chaste life, and gave her husband good cause for divorcing her, if he had chosen to dissolve the marriage tie; but it by no means follows that Stuart Skinner either thought that it would be conducive to his interest, or that he intended to avail himself of that remedy. On the contrary, his repeated judicial assertions that, notwithstanding their actual separation, he still continued to be the husband of the respondent, strongly point to the inference that his design was to retain the hold over his wife which that relation gave him, in order that he might use it for his own advantage. If he had really been desirous to divorce the lady, he could have done so whenever he chose according to Mahomedan law. It would, in their Lordships' opinion, be somewhat rash to assume that the counter statements of these two parties were not affected by motives of self-interest; but they see no cause to prefer, as the District Judge did, the statements of the respondent, who had a clear object in stating that she was divorced in the first and second of these suits, and, so far as they can see, she may have been actuated by the same motive when giving evidence in the year 1881.

The appellants founded strongly upon evidence which was led by them after the remand as establishing that, subsequently to their disputes in court, Stuart Skinner had a meeting with Badshah Begum, in her mother's house at Delhi, at which their controversy as to the fact of the divorce had been settled

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by Stuart Skinner admitting it. The date of the meeting is not precisely fixed, but it appears to have been about the year 1860 or 1861. Four maulvis, or sages learned in the law, are said to have been present, and to have had submitted to them for their opinion a paper containing the precise words which were addressed by Stuart Skinner to his wife in 1859, at the time when they separated. From the account given by Amanullah, a leading witness for the defendants, he had suggested to Badshah Begum "a reference to learned men (ulama) to whom the words used should be stated, and who should give their opinion whether they amounted to a divorce or not, she appointing some and Nawab Mirza some. To this she agreed. On behalf of Nawab Mirza, I called Maulvi Sayad Muhammad and Maulvi Karimullah, and she called Maulvi Sad-id-uddin and another, whose name I forget. I was present at their meeting. A friend of hers stated the words used by Nawab Mirza, Badshah Begum being behind pardah." The deliberations of the learned conclave and the result of the meeting are thus stated by the same witness: "After consultation, Maulvi Sayad Muhammad said that the divorce was not clear, while the other learned men said it amounted to a divorce."—"No written opinion was recorded; before it could be done, dispute arose, and we dragged away Nawab Mirza from the house."

Assuming that such a meeting took place, terminating in a conflict which does not appear to have been confined to logic, and from which it was necessary to remove Stuart Skinner, alias Nawab Mirza, by force, their Lordships are unable to derive from it any inference that Stuart Skinner then admitted that Badshah Begum had ceased to be his lawful wife. There is, in their opinion, no satisfactory evidence to shew that the words, which on that occasion are said to have been represented to the maulvis as having been the precise words used by the husband in 1859, were so in fact, or were admitted by both parties to be so. Nor does it appear that either of the spouses intended or consented to be bound by the opinion of the maulvis. There is really no trustworthy evidence to prove the language used by the husband in 1859. The version which is said by witnesses examined in this case to have been used at

the meeting of 1860 or 1861, depends upon the memory of people not altogether neutral, who are speaking after a lapse of thirty years. The District Judge in his report relies to some extent upon the depositions of certain witnesses, taken in Badshah Begum's suit of 1865, which have been put in evidence in this case, but the judges of the High Court make no reference to them. That testimony does not appear to their Lordships to be calculated to dispel the obscurity in which the matter is involved. Ahmed Jan, one of Badshah Begum's witnesses, says that he and three others were present in her mother's house, when Stuart Skinner said to her three times, "I have divorced you," and then went away. Another witness, servant of a female relative of Badshah Begum, tells a similar story, but says that besides himself there were only two persons present, including Ahmed Jan. Both those witnesses state that there were no relations of either spouse present. The evidence of Maulvi Sad-id-uddin refers not to what took place in 1859, but at the meeting of 1860 or 1861, which has been already noticed. In these circumstances, their Lordships have come to the conclusion that the defendants have failed either to establish that Stuart Skinner admitted that he had divorced his wife according to Mahomedan law, or to prove the words which he actually used in 1859, so as to enable a Court of law to determine whether they did or did not amount to a Mahomedan divorce.

Their Lordships will, accordingly, humbly advise Her Majesty to affirm the judgment appealed from and to dismiss the appeal. There will be no order as to costs.

Solicitors for appellants: *T. L. Wilson & Co.*

J. C.* 1897 — *Nov.* 16; *Dec.* 15.

LALA NARAIN DAS . . . . . PLAINTIFF;

AND

LALA RAMANUJ DAYAL . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Agreement to accept a Boy as Heir—Oral Evidence— Mutual Representation of Intention.

Upon an issue whether the deceased had covenanted with the defendant's father to make the defendant his heir, or in the event of his having issue to give the defendant a portion of his property :—

Held, on the evidence, which was entirely oral, that there was no contract or agreement, but only an expectation of benefit on either side. The father could not bind his son beyond his minority, and it was unreasonable to impute to either side an intention that the deceased should be bound to make the boy his heir in any event.

APPEAL from a decree of the High Court (Feb. 9, 1893) reversing a decree of the Subordinate Judge of Meerut (Sept. 29, 1890).

The plaint was filed on July 31, 1888, by six persons being reversionary heirs (of whom the appellant is the nearest) of Durga Parshad, who died childless on August 1, 1322, aged 29, having been wounded in an affray. It alleged that after the death of Durga Parshad the defendants, his widows and mother, got the name of the first defendant, Ramanuj Dayal, entered (either solely or jointly with their own names) in respect of the landed properties, upon a false representation that Durga Parshad had adopted his sister's son, Ramanuj. They prayed for a declaration that such adoption had never taken place, and would be invalid; that Ramanuj was not the heir of Durga Parshad, or entitled to possession of his estate; and for an order that the widows should invest the surplus income of the property for their benefit.

The defendants put in written statements, all substantially to the same effect. They did not assert any adoption of the

* *Present*: LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

first defendant. Their case was that Durga Parshad had brought up Ramanuj Dayal from childhood in his own house, and had promised Ganga Saran, his father, to make him his heir, that he had died suddenly before he could carry out his intentions, and that the widows, in obedience to his known wishes, had put the boy in possession of the property and recognised him as heir.

It was also asserted that the plaintiffs had themselves sanctioned and recognised this proceeding, and were unable to repudiate it. In any case, it was submitted that the widows were competent to put him in possession for their own lives, and could not be compelled to make any savings for the benefit of the reversioners.

The Subordinate Judge, after holding as a matter of fact that the contract described in the issue set out in their Lordships' judgment had been made as alleged, proceeded to hold that the contract itself was not good and binding on the plaintiffs. He did so on the ground that it neither created any new relationship between Durga Parshad and Ramanuj, nor destroyed the previous relationship between Ganga Saran and his son. In his opinion "there was nothing in the promise of Durga Parshad which could prevent Ganga Saran from removing the boy if he found that his morals were being spoilt under his maternal uncle, or Durga Parshad from sending away the boy if he wished."

He accordingly decreed in favour of the plaintiffs. Ramanuj Dayal appealed to the High Court against the finding of law; but no appeal was made by the plaintiffs against the finding in fact.

The High Court remarked that as regards the validity of the contract made between Durga Parshad and Ganga Saran, that issue hardly arose in the suit, as the plaintiff's case was not that the contract was invalid, but that it never had been made, which was found against him. The Court then proceeded to examine the finding of law recorded by the Subordinate Judge, and summed up their conclusions as follows:—

"We are therefore of opinion that the contract was not tainted with illegality or opposed to public policy; that it was,

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on the contrary, typical of what must always happen in every case when a father does not personally superintend the entire infant life of his children; and, moreover, in this case it was manifestly for the benefit of the boy that the contract was entered into. We believe it to be a good and enforceable contract, and we believe further that the widows of Durga Parshad not only intended, but did give effect to it operatively immediately after Durga Parshad's death in performance of their duty to him; for it is a duty rather than a right of a Hindu widow. We find that the widow Ram Dei expressly says that she considered the boy had been put immediately after the death of Durga Parshad in possession of the property which the deceased had intended, and declared his will to bestow on him, and that the presence of their names in the application for mutation of names was due to certain advice and to the consideration that the boy might turn out undutiful, which might make it desirable to maintain some apparent precaution till he should obtain his majority. We think, therefore, that his position as possessor of the property of Durga Parshad is unimpeachable by the reversioners, who are the respondents in this suit, and we therefore decree this appeal, and dismiss the respondents' suit with costs in both Courts."

Cohen, Q.C., and *C. W. Arathoon*, for the appellant, contended that the transaction between the deceased and Ganga Saran did not on the evidence amount to a binding contract. The evidence did not shew that Durga Parshad had determined in any event to accept Ramanuj as his heir, freed from all control, binding himself whatever happened to make over his estate to him at his death. Ganga Saran was not shewn to have absolutely and in all events parted with his son and relinquished all power and control over him; if he had it was against public policy that his act should be held valid. What took place was that there was a mutual representation of present intention. That was not binding upon either of them: *Jorden* v. *Money* (1); *Alderson* v. *Maddison* (2); *Citizens' Bank*

(1) (1854) 5 H. L. 185.

(2) (1880) 5 Ex. D. 293; and on appeal, (1883) 8 App. Cas. 467.

of Louisiana v. *First National Bank of New Orleans* (1); *Coverdale* v. *Eastwood*. (2) The appeal was prosecuted by the nearest reversionary heir: see *Rani Anund Koer* v. *Court of Wards*. (3)

Crackanthorpe, *Q.C.*, and *Mayne*, for the respondent, contended that the evidence shewed that there had been abundant consideration proceeding from Ganga Saran to Durga Parshad (completed when the boy was transferred) to support a promise by the latter to make the boy his heir. It was proved to the satisfaction of both Courts that Durga Parshad had in fact made that promise. It was binding on him in law, and it was the duty of his widow, who for this purpose represented his estate, to carry the promise into effect. Ganga Saran not merely transferred the boy, but he agreed to allow and did allow him to remain under the care of Durga Parshad, and to be maintained and educated by him. There was no such abandonment of parental authority as to make this consideration illegal, or to vitiate the contract to which it gave rise. Reference was made to *Lyons* v. *Blenkin* (4); *Bhala Nahana* v. *Parbhu Hari* (5); *Reg.* v. *Smith*. (6)

Cohen, *Q.C.*, replied.

The judgment of their Lordships was delivered by

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SIR RICHARD COUCH. Durga Parshad, who died childless on August 1, 1882, leaving two widows, Ram Dei and Hira Dei, was the grandson of Bakhtawar Singh, the son of Jawahir, who had also three other sons, Dilawar Singh, Kishan Sahai, and Har Sahai. Dilawar died leaving an adopted son Chanda Lal, Har Sahai died leaving four sons, Anand Sarup, Jugal Kishorie, Narain Das, and Ram Saran Das. The suit was brought by Kishan Sahai, Chanda Lal, and the four sons of Har Sahai against the respondent and the widows and the mother of Durga Parshad. The plaint stated that in order to defeat the rights of the reversioners the widows had caused the name of the respondent to be entered in respect of most of the properties

(1) (1873) L. R. 6 H. L. 352
(2) (1872) L. R. 15 Eq. 121.
(3) (1880) L. R. 8 Ind. Ap. 14.
(4) (1821) Jacob, 245.
(5) (1877) Ind. L. R. 2 Bomb. 67.
(6) (1853) 22 L. J. (Q.B.) 116.

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left by Durga Parshad along with theirs, and his name alone in respect of some on the false allegations that Durga Parshad left them and Ramanuj Dayal, the minor son of his sister, as his heirs; that he, owing to his having no issue, kept Ramanuj Dayal with him as his adopted son and heir, promising that, in case of his having no male issue, he and his descendants should succeed as owners to the entire property left by him, but that they should have no right to waste the property; and that in case of his having a son of his own, Ramanuj Dayal should get an equal share with him; that he had brought him up, educated him, and celebrated his marriage as if he was his own son; that the widows, in their own right and as guardians of the minor, were heirs in possession of his estate. And the plaintiffs prayed that it might be declared that, these allegations being false, the transfers of the estate of Durga Parshad made on them in favour of Ramanuj Dayal were void as against the plaintiffs or the persons who at the death of the widows would be reversioners, and that the statement that Ramanuj Dayal or his descendants were entitled to the estate of Durga Parshad, by virtue of any declaration falsely attributed to him, was of no effect and false. The widows, in their written statement, said that as their husband was killed suddenly, he could not execute any document in favour of Ramanuj Dayal, and they, therefore, in accordance with his promise and order, made over the entire property to him. The mother in her written statement said the same. Ramanuj Dayal, in his written statement, said that Durga Parshad had a great affection for him from his childhood, and constantly kept him with him, and eventually entered into a contract with him through his father, his guardian, to make him proprietor of, and heir to, all his property; from that time he lived with Durga Parshad as his son, and the widows, in pursuance of the stipulations and directions of their husband, continued to maintain and bring him up during his minority, and gave him possession of all the estate left by Durga Parshad. Upon these pleadings the following issue was settled by the Subordinate Judge :—

"Did Lala Durga Parshad covenant with defendant's father on his behalf to make the defendant his heir and owner of the

property, and in the event of his having issue, to give a portion of the property to the defendant? Is such a covenant, if proved, good and binding upon the plaintiff?"

This was the substantial question in the suit. Durga Parshad having died childless, the widows were entitled to his property during their lives, and could dispose of their interest in favour of Ramanuj Dayal, but they could not go beyond that. If the reversioners were to be bound, it must be by the act of Durga Parshad. There was no issue whether the allegations of the widows were false. It was not necessary, as if they were true they would not justify the action of the widows if there was no contract by Durga Parshad, as was alleged by Ramanuj Dayal. The evidence of the widows as to what was said by Durga Parshad and Ganga Saran when the alleged covenant or agreement was made is only hearsay, and, to use the language of the Indian Evidence Act, is not relevent. It was admitted by the Subordinate Judge, and is in the record, but it ought now to be disregarded. The evidence of Jwala Parshad, another witness, is too vague and uncertain to have any weight. The principal witness is Ganga Saran, the father of the respondent, who is corroborated in some respects by Diwan Singh, but without that his evidence may be considered trustworthy. Their Lordships have considered the whole of his evidence which is material to the question of a contract, but it is sufficient to state the part which is directly applicable to it. He says that Durga Parshad said to him: "'My property is for this boy; I have no dearer relation in this world than this boy. I will give my property to this boy. He goes to members of the brotherhood on my behalf, and does my household business. If you will take him with you how shall I manage these affairs.' At last Durga Parshad uttered these words: 'I would make him my heir and he would get sufficient education at Meerut for my business.' I said to him: 'Two years have elapsed since your marriage. It is hoped that you may get an issue and your own son may soon be competent to manage your affairs.' Thereupon he said: 'Even if a son be born, mind that I would give a share to Ramanuj Dayal. It is by no means my intention that I may in any way deprive him,

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but give up this hope that I would ever part with him and allow him to go with you.' Lala Jwala Parshad made me understand that my object was the welfare of the boy, that he could not remain with me, for if I got him admitted into the college or sent him to England he could become separated from me, and that I should do what Durga Parshad liked. I thinking that he will be recompensed here for education in England, and that it was impossible to take the boy without complete displeasure of Durga Parshad, and that I did not like to displease him, I told Durga Parshad that the boy was his if he wished to keep him, and that I would not interfere in this affair. Up to that time there was no other son of mine. I finally left the boy, saying that I waived all claim to the boy, and the thought of taking him did not remain in my mind." The reference to the college and England is explained by Ganga Saran having said in the previous part of his evidence that he told Durga Parshad that he wanted to take the boy to Agra (where there is a college), and there educate him, and that he wished he should be educated in England, "either for service or for the Bar." At this time the respondent was nine years old, and, being the son of a sister of Durga Parshad, could not according to Hindu law be adopted by him. The only way by which the respondent could be made his heir was by a deed of gift or by a will. Diwan Singh, in his evidence, said that Durga Parshad, about two months before his death, asked him to write out a deed of gift in favour of Ramanuj Dayal, and upon his saying it was not proper to do so, and asking him whether he should write out a will, told him to do so; that the matter was put off from time to time, and the will was not written.

Upon the evidence in the case their Lordships are of opinion that there was no contract or agreement; there was only an expectation on each side—on the part of Durga Parshad that if the respondent continued to live with him, and was brought up and educated under his care and control, the respondent would be induced, by the prospect of becoming his heir, to continue to live with him; and on the part of Ganga Saran, that if he gave up the boy, Durga Parshad would have him educated and

make him his heir. Ganga Saran could, according to any view, only bind the respondent during his minority ; and it is very difficult to believe that it was their intention that Durga Parshad should be bound in all events to make the boy his heir when, upon the respondent attaining majority, Durga Parshad would have no control over him, and he might determine to leave him. Gratitude would be a very weak obligation upon the respondent if he knew that the estate must become his. The Subordinate Judge found that Durga Parshad made a promise to Ganga Saran that he would make the respondent his heir if he had no male issue, or would give him a share in his property if he had such, but that it did not amount to a contract, and was not binding on the reversioners. He made a decree declaring that the reversioners of Durga Parshad, deceased, should, after the death of the widows and the mother of the deceased, be entitled to get the estate of the deceased by right of inheritance, and that the rest of the plaintiffs' claim should be dismissed. Ramanuj Dayal appealed to the High Court at Allahabad, and that Court ordered the decree of the Subordinate Judge to be set aside and the suit to be dismissed. Their Lordships are quite unable to agree in the reasons of the two learned judges of the High Court for making this decree. They appear to their Lordships to have entirely disregarded the question in the suit (whether what passed between Durga Parshad and Ganga Saran amounted to a contract), and indeed in the former part of their reasons to have misconceived the real question in the case, and in the latter part to have conceded that there was a contract, and only considered whether it was illegal or opposed to public policy. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the High Court, and to order the appeal to it to be dismissed with costs, and to affirm the decree of the Subordinate Judge. The respondent will pay the costs of this appeal.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondent : *Barrow & Rogers.*

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RAO BALWANT SINGH . . . . . PLAINTIFF.

AND

RANI KISHORI . . . . . DEFENDANT.

TWO CONSOLIDATED APPEALS.

ON APPEAL FROM THE HIGH COURT FOR THE NORTH WEST PROVINCES, ALLAHABAD.

Hindu Law—Mitakshara—Power to alien self-acquired Immoveables—Jagir—Construction—Grant to a Hindu and after him to his Heir for Generation after Generation—Effect of Foreclosure by the Ancestor's Mortgagee—Validity of Appointment of Acting Judge.

Where the terms of a jagir granted by the Government were "the revenue of seven villages granted for lifetime shall remain under remission till the grantee's lifetime, to wit, their zemindars who now pay the revenue to British Government shall pay it to him, and after him they shall ever pay 10 per cent. as malikana allowance to his heir after the deduction of Government revenue for generation after generation" :—

Held, that the grant of the malikana was an absolute one ; and that there were not two distinct gifts, one for life to the donee, and the other absolutely after his death to the person who might then be his heir :

Held, that a father of an undivided Hindu family subject to the Mitakshara law has full power of disposition over his self-acquired immoveable property.

Where a mortgage of a village by the ancestor was admitted and a foreclosure against his heir was in a suit between third parties held to be genuine against a creditor of the ancestor whose claim was defeated by it :—

Held, that this was strong evidence that the foreclosure also was genuine and effective. One effect of it was to destroy the ancestral character of the village, the equity of redemption having been the only interest therein inherited from the ancestor.

Held, that under the Indian High Courts Act, 1861, no limit of time is mentioned within which, after the happening of a vacancy, an acting judge may be appointed ; and an appointment cannot be impugned as having been made after a reasonable interval had elapsed.

CONSOLIDATED APPEALS by the appellant from two decrees of the High Court (Aug. 14, 1893), the first of which decreed the respondent's appeal from a decree of the Judge of Mainpuri

* *Present :* LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, and SIR RICHARD COUCH.

(Jan. 28, 1890), and the second of which dismissed the appellant's cross-appeal therefrom. The decree of the District Judge dismissed the appellant's suit as regards all the properties included in it except the zemindary property in the village Bakewar. The effect of the two decrees of the High Court was to dismiss the suit entirely.

The appellant made title to the properties in suit as the only son and heir-at-law of Rajah Jaswant Rao, who was the son of Rao Khuman Singh and died on August 24, 1879. The respondent defended her possession thereof by making title to a considerable portion as her stridhan, and to the remainder under a deed of gift executed in her favour by her husband, Rajah Jaswant Rao, on September 4, 1875.

Concurrent findings of fact having disposed of the greater portion of the properties in suit in favour of the respondent, the appeal related mainly to property included in the deed of gift, and raised the question as regards most of it that, notwithstanding that they were Jaswant Rao's self-acquired immoveables, they were not within his disposing power was exercised by the deed of gift. With regard to Bakewar alone the antecedent question of fact was still open, whether it was ancestral or self-acquired, on which the Courts below had differed. There was a further question of construction of a grant (set out in their Lordships' judgment) by the Government of a jagir to Jaswant Rao, whether as regards a portion of the grant it was absolutely in favour of the donee, or whether it operated simply as a grant for life and therefore was unaffected by the deed of gift.

The facts are stated in the judgment of their Lordships.

The District Judge decided as follows :—

(1) " Following the latest rulings, I hold that if the property referred to in the deed of gift was Rajah Jaswant Rao's self-acquired property he could deal with it as he saw fit, and his disposition of it cannot be successfully attacked by the plaintiff."

(2.) " The case as regards Bakewar stands on a different footing from that of the other villages. From the documentary evidence filed in the case it appears that it was mortgaged by

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Rao Khuman Singh to one Kunjbehari Lal by a deed of conditional sale executed on August 19, 1839. It had been previously mortgaged to one Mahant Lachman Das in 1836. On the death of Khuman Singh, which took place in 1844, litigation took place between the rival mortgagees. The dispute between them was referred to arbitration and decided on May 11, 1846, the result being that Kunjbehari Lal paid off the amount due to the prior mortgagee. He got a decree on March 20, 1854, to have his name entered as proprietor and Jaswant Rao's name expunged. But in a suit between him and Jaswant Rao, decided on August 19, 1869, it was held that this decree was never executed and had become barred by lapse of time, and that Kunjbehari Lal had been in possession only as mortgagee.

"Evidence has been given on behalf of defendant to prove that on June 22, 1858, in lieu of a payment of Rs. 4526 12*a.* received from Thakurani Adhar Kunwar through Jaswant Rao her general manager, and Sheo Charan Lal her agent, Kunjbehari Lal gave up the decrees he had, and declared his foreclosure proceedings cancelled. The defendant's counsel contends that this was a sale of the proprietary rights of the village; but this is a contention I cannot sustain. In the suit above referred to, decided on August 19, 1869, it was held that Kunjbehari Lal was in possession of the village 'only as a mortgagee,' and the amount paid, which 'is less than the annual revenue of the village,' bears out the plaintiff's contention that what took place on June 22, 1858, was nothing but the discharge of an incumbrance on the village. It will be seen, too, that in an application presented to the Revenue Court by Jaswant Rao on March 18, 1868, he speaks of this village as having always been entered in his name, and as having been in his properietary possession up to that year.

"Although in the deed of gift Jaswant Rao asserted that this village had been bestowed on him by Adhar Kunwar, this assertion is, I hold, without foundation. This village is not included in the deed of gift of 1871, by which Adhar Kunwar conveyed to Jaswant Rao the villages of Lachman, Berikhera, Aheripur and Indraokhi, and no reason is suggested for this

exclusion. The evidence adduced to prove the gift is exceedingly feeble. The witness Gursahai says: 'Five or six months after Kunjbehari had got his arrears paid by Adhar Kunwar (this relates to the transaction of June 22, 1858) she gave to Jaswant Rao the foreclosure decree she had got from Kunjbehari saying, "I give it to you." ' Admitting that this incident took place, I cannot look on it as a conveyance of the proprietary rights of Bakewar, for these were not hers to give, but regard it as merely a surrender of her claim to be recouped the amount she had disbursed to the incumbrancer.

"The defendant, however, in addition to the assertion that the Bakewar village was given to Jaswant Rao by Adhar Kunwar, which assertion I find not to be substantiated, relies on the allegation this village was sold by Jaswant Rao to his friend Lala Sheo Narayan in 1868, and then bought back in 1871. I think it is clearly proved by the evidence of Sheo Narayan himself and of defendant's witness Gursahai that this sale was merely of a nominal character. . . . .

"To hold that a transaction of this nature has the effect of destroying the ancestral character of property would be a most dangerous doctrine, as it would put it in the power of any Hindu father to defeat his children's rights by a temporary alienation of the property he himself had inherited. The conclusion I come to then as regards this village is that Jaswant Rao inherited the proprietary rights in it from his father, that he had therefore no power to convey these rights to his wife, and that as respects this village the plaintiff is entitled to a decree.

(3.) "The effect of the grant as regards the *seven* villages, of which he was not the owner, was that the zemindars of those villages had to pay their land revenue to him as long as he lived, instead of to Government, and after his death had to pay a percentage of it to his successor. I am of opinion that an estate of this nature is self-acquired property, and in this opinion I am borne out by the views expressed in paragraph 262 of Mayne's Hindu Law, where it is laid down that 'estates conferred by Government in the exercise of their sovereign power become the self-acquired property of the donee, whether such gifts are absolutely new grants or only the restoration to

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one member of the family of property previously held by another, but confiscated.'

"As to the 10 per cent. malikana allowance from the other villages, it was for plaintiff to shew that his father had no power of disposing of it, and that the son was entitled to succeed to it under the terms of the sanad. This contention, in my opinion, is likewise unsound. It is true that by the terms of the grant the zemindars of the seven villages are to pay to Jaswant Rao's heirs, generation after generation, 10 per cent. of the revenue. But who is to be considered the *heir*? This, I think, depends on whether the grant comes under the category of *self-acquired* property. I have already held that it does. It was therefore Jaswant Rao's to bequeath to whom he wished, and he bequeathed it to the defendant, who therefore, so far as the grant is concerned, is his *heir*. For the above reasons I hold that plaintiff's claim to the assigned revenue fails, and must be dismissed."

The High Court dealt with the three points as follows :—

(1.) "There is a last plea in the memorandum of appeal to the effect that Rajah Jaswant Rao was not competent to disinherit his only son, the appellant. To this plea the learned counsel for the appellant made no allusion beyond stating that he did not withdraw it. The respondent's counsel did not answer the plea. An attempt was made on behalf of the appellant at the very end of the reply to address us upon it. We however ruled that under the circumstances it was not competent to the learned counsel to address any argument to us then for the first time. The plea will be dealt with towards the end of our judgment in this appeal."

The end of the judgment contained these words: "In view of the above findings no necessity arises for considering this plea. Even had such necessity arisen, we are of opinion that appellant, by not addressing to us any remarks in support of it, must be taken virtually to have abandoned it."

(2.) "The Lower Court arrived at its decision with regard to Bakewar, "from having overlooked the fact that Bakewar lost its character of ancestral property finally and for ever as soon as the year of grace allowed by Regulation XVII. of 1806 expired.

From that date Kunjbehari Lal became absolute proprietor. Even granting that the effect of the decree of the 19th August, 1869, in the suit to which we shall next refer between Kunjbehari Lal and Jaswant Rao, in which it was held that Kunjbehari Lal had been in possession only as mortgagee, gave Jaswant Rao the status of proprietor with a right to redeem, he would be proprietor of self-acquired, not of ancestral property. The very language of transfer shews that when Kunjbehari Lal transferred his rights in Bakewar to Thakurani Adhar Kunwar, he realized that he was proprietor, otherwise there would have been no force or meaning in his pretence to set aside and annul the foreclosure transaction—an act which he had absolutely no power to do. As full proprietor he transferred to Thakurani Adhar Kunwar, thereby making her full proprietor. It seems to us that this document did not receive the force and construction which it should have received at the hands of the Lower Court. It supplements and corroborates the evidence given by Gursahai.

"In 1869 the village became again the subject of litigation. This time between Kunjbehari Lal and Rajah Jaswant Rao, and in that suit the extraordinary decision was arrived at that as Kunjbehari Lal had never executed his decree of March 20, 1854, and it had become barred by lapse of time, Kunjbehari Lal had been in possession only as mortgagee. The Court of first instance apparently accepts the conclusion, and holds that Bakewar never passed out of the hands of Khuman Singh or his family, and that Kunjbehari Lal never had any higher title in regard to it than that of mortgagee. This conclusion is attacked by the appellant. He contends before us that Kunjbehari Lal, by his decree of March 20, 1854, became full proprietor over the village, and that on that day at any rate mauza Bakewar ceased to be ancestral property.

"It appears to us that there is great force in this contention. Under Regulation XVII. of 1806 the conditional sale deed had been judicially declared absolute, and nothing more was needed to clothe Kunjbehari Lal with the status of full proprietor. He had been in possession as mortgagee, but from the date of the decree of March 20, 1854, his possession as proprietor

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became at once adverse to that of Jaswant Rao, and the property ceased to be that of Jaswant Rao's in any sense, ancestral or otherwise. It matters little that by the indorsement on the decree above alluded to, viz., the indorsement of June 22, 1858, Kunjbehari Lal professed to set aside the foreclosure proceedings and to render them null and void; no words and no document of his could effect such an act, or could restore to mouza Bakewar its former condition, viz., that of ancestral property in the hands of Jaswant Rao.

"The language of s. 8 of Regulation XVII. of 1806 is very clear and precise, and provides that if the mortgagor, in this case Rajah Jaswant Rao, shall not redeem the property, the property mortgaged in the manner provided for by s. 7 of the same regulation, the mortgage will be finally foreclosed and the conditional sale will become conclusive. Thakurani Adhar Kunwar held the village for some months, and then made it over to Jaswant Rao. In 1868 Jaswant Rao sold the village to Sheo Narayan, and immediately upon the sale arose the litigation of 1869 between Kunjbehari Lal and Rajah Jaswant Rao which ended in the extraordinary decision above referred to.

"The plaintiff takes his stand upon the judgment and decree of 1869, that was delivered in the suit above mentioned, brought by Kunjbehari Lal for establishment of right to, and maintenance of possession over, mauza Bakewar, and to set aside a sale deed under which Rajah Jaswant Rao had, on February 15, 1868, conveyed it to Sheo Narayan. It is a most involved and in many places obscure judgment, but there was no doubt that under it Kunjbehari Lal's claim was dismissed, and it was held that the foreclosure proceedings were fictitious, the only object being to save the property.

"In considering the value of this judgment it must not be forgotten that, so far as the appellant was concerned, it was not a judgment inter partes, and that at its highest it cannot be looked upon as conclusive, but only as a piece of evidence. Both the appellant and respondent in this appeal are representatives of Rajah Jaswant Rao, who was defendant in that case. No one in this appeal derives title through Kunjbehari Lal,

who was then plaintiff. Moreover, it was in no way competent to the Court which decided the case in 1869 to set aside the foreclosure judgment and decree of 1854.

"The Sadr. Dewani Adalat in 1856 had determined that the mortgage deeds of Lachman Das and Kunjbehari Lal were both genuine instruments; that the deed of conditional sale held by Kunjbehari Lal was considered as being still in force and in nowise modified by the arbitration award, positions both of which are assailed by this judgment without any reference to the determination of the case by the Sadr. Dewani Adalat. The judgment in question virtually amounts to a setting aside of those findings.

"Much stress was laid upon the improbability of a valuable village like Bakewar being conveyed for a sum of Rs.4526 12*a*. This consideration is not, however, entitled to much weight; the transaction took place just after the Mutiny, and at a time when Kunjbehari Lal was, if any value is to be attached to the judgment of 1869, under great obligations to Raja Jaswant Rao for procuring him release from custody. Matters at this time had, so far as Kunjbehari Lal was concerned, reached a very serious crisis, and if the bragain relating to Bakewar saved Kunjbehari Lal from death by hanging, it was, so far as he was concerned, a valuable bargain. Kunjbehari Lal, so says the judgment aforesaid, and there is other evidence to corroborate it, had been arrested and was about to be tried by martial law, and according to the Special Commissioner deserved to be hanged. The value of property, too, at a time like this would be very different from its value in days of security.... We find that on March 20, 1854, Bakewar had ceased to be ancestral property. It matters little how Rajah Jaswant Rao afterwards became possessed of it: it could only be self-acquired property in his hands, and capable of alienation by him at his pleasure."

(3.) "As regards the interpretation to be put on the grant made by Government and bearing date April 6, 1861. The first fact to be noticed in connection with it is that it makes no allusion whatever to the plaintiff or to any service rendered by him. The grant confers certain of the villages on Raja

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Jaswant Rao, Bahadur, 'for generation after generation.' As to the rest, the words are that they are granted for his lifetime, and that the revenue of the seven villages granted for lifetime shall remain under remission during his life, and that after his death the zemindars are to pay 10 per cent. malikana to Jaswant Rao's heirs after the deduction ot Government revenue for generation after generation. The whole language of the deed shews that it was a deed granted in return for personal good services rendered to the Government. There is nothing in the deed to lead us to hold that the property conveyed by it was not property over which Rajah Jaswant Rao had full right of disposal.

"The interpretation which we have put upon the deed, and which was put upon it by the Lower Court, is in accord with the view taken by their Lordships of the Privy Council in *Gulab Das Jagjivan Das* v. *Collector of Surat.* (1) Their Lordships held that 'a jagir must be taken prima facie to be an estate only for life, although it may possibly be granted in such terms as to make it hereditary.'

"Jaswant Rao had in our opinion as much right and control over all the property granted under it as if it was self-acquired property."

Ross, for the appellant, contended, in reference to the first point, that although the District Judge was right in attributing to the later decisions in India a uniform ruling to the effect that under the Mitakshara a member of an undivided Hindu family has absolute power of disposition over his self-acquired immoveable estate, and the High Court had declined to hear argument on the subject, yet the point had never been actually decided by the Judicial Committee, and therefore was still an open one. The point raised by this case was narrowed down to this—whether the father of an undivided family could so deal with his self-acquired immoveables as to disinherit his only son. He referred to *Baboo Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (2) as shewing that the point was designedly left open by the Judicial Committee. He referred to the conflict-

(1) (1878) L. R. 6 Ind. Ap. 54. (2) (1867) 12 Moore's Ind. Ap. Ca. 39.

ing texts contained in the Mitakshara, namely, c. 1, s. 1, v. 27, and c. 1, s. 5, v. 10, and contended that, contrary to the decisions in India, the conflict between them should be decided in favour of the appellant. Reference was made to Strange's Hindu Law, vol. 1, p. 261, and vol. 2, pp. 436, 439, 441, 450; to the Vivada Chintamani, pp. 309, 76, 228, 229, describing it as a compendium of Hindu law practically the same as the Mitakshara. He referred also to *Rajah Bishen* v. *Bawa Misser* (1) (*Mayne* referred to the *Bithoor Case.* (2)) See, for the North-West decisions on this point, *Mahasookh* v. *Budree* (3), *Sital* v. *Madho* (4), and in Madras see *Tarachand* v. *Reeb Ram.* (5)

Upon the second point he contended that the District Judge was right in holding that Bakewar, which was originally ancestral and mortgaged by the ancestor Khuman Singh, retained its character of ancestral estate, the acts of Kunjbehari Lal with regard to its alleged foreclosure being in collusion with Jaswant Rao and a fraud, not merely on the creditors of Khuman Singh, who now were all barred by limitation, but also on the appellant as heir of the mortgage. The foreclosure decree relied upon on the other side was on the evidence a mere sham, and could even at this distance of time be reopened. He referred to ss. 1, 7, and 8 of Regulation XVII. of 1806 and *Forbes* v. *Ameeroonissa Begum.* (6) As to reopening a foreclosure, reference was made to *Morely* v. *Elways.* (7) Upon the third point, the construction of the sanad of 1861, he contended that in reference to the malikana the gift was to Jaswant for life, and in remainder an absolute gift, in the events which had happened, to the appellant. The words used were not in this instance words of limitation, as in English law. Finally, it was contended that Burkitt J. had been invalidly appointed as a judge of the High Court, and that therefore, the proceedings had been coram non judice.

(1) (1873) 12 Beng. L. R. 430; S. C. 20 Suth. W. R. 137.

(2) (1862) 9 Moore's Ind. Ap. Ca. 96.

(3) (1869) 1 N. W. P. (Agra) 153.

(4) (1877) Ind. L. R. 1 Allah. 394.

(5) (1866) 3 Madr. H. C. R. 55.

(6) (1865) 10 Moore's Ind. Ap. Ca. 340, 348.

(7) (1668) 1 Ch. 107.

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Reference was made to *Queen-Empress* v. *Gunga Ram* (1), which was a judgment of a Full Bench of a date subsequent to the judgment now under appeal. The arguments set forth therein to shew that the appointment was not legally made were relied upon.

Mayne, and *Cowell*, for the respondent, contended that there had been unanimity of decisions for the past twenty-five years in India as to the power under the Mitakshara law to dispose absolutely of self-acquired property. The judgment of the High Court in Bengal in *Muddun Gopal* v. *Ram Buksh Pandey* (2) had disposed of the controversy relating to the conflict of dicta in the Mitakshara. Refernce was also made to the *Hunsapore Case* (3) and the *Bithoor Case* (4), where the point was raised and the judgment, though on a question of fact, proceeded on the footing of the law having been decided favourably to the self-acquirer : *Rajah Bishen* v. *Bawa Misser*. (5)

Upon the second point they contended that the plaint raised only the question whether Khuman Singh's mortgages were valid. Neither plaint pleadings, nor evidence related to the question whether, assuming the mortgage to be valid, the foreclosure was collusive and inoperative. The litigation shortly after the foreclosure, and at the instance of a creditor of Khuman Singh, did not raise the question as to the invalidity of the foreclosure : see report of District Judge's judgment in the N. W. P. District Reports, September, 1854 (Mainpuri), p. 149, and in the Sudder Court, 1856, Allah. S. D. A. p. 119. The later litigation to which Kunjbehari was a party did not attack the foreclosure : it raised the issue whether the indorsement a transfer as a forgery.

Upon the validity of Burkitt J.'s appointment the point had not been taken in the Courts below, and there were no facts in the record which raised the point. The case in 16 Allah. decided in favour of its validity.

Ross replied.

(1) (1894) Ind. L. R. 16 Allah. 136, 140, 156.

(2) (1863) 6 Suth. W. R. 71

(3) 12 Moor's Ind. Ap. Ca. 39.

(4) 9 Moore's Ind. Ap. Ca. 96.

(5) 12 Beng. L. R. 430.

1898. Feb. 18. The judgment of their Lordships was delivered by

LORD HOBHOUSE. In the suit which gives rise to this appeal the plaintiff, now appellant, claimed as heir-at-law of Rajah Jaswant Rao to be entitled to properties valued at 40 lacs of rupees, of which Jaswant's widow, Kishori, the defendant below and the respondent here, had become possessed. As regards the larger portion of this property, principally moveable, the plaintiff has failed in both the Courts below, and raises no further question. He still claims (1.) the proprietary right in five villages conveyed as a gift by Jaswant to Kishori by deed dated September 4, 1875; (2.) the proprietary right in two other villages purchased by the defendant after Jaswant's death; and (3.) a perpetual charge by way of malikana amounting to 10 per cent. of the revenue of seven other villages which were the subject of a grant by the Government of India to Jaswant, dated April 6, 1861. The District Judge decided against the plaintiff as to all these properties, except one of the five villages named Bakewar. As to that village the District Judge held that it was ancestral property which Jaswant had no power to alienate by way of gift, and he decreed possession of it to the plaintiff. Both parties appealed to the High Court. Separate orders were made on the two appeals. The plaintiff's appeal was dismissed; the defendant's was allowed; so that the plaintiff's suit stood dismissed as to all his claims. The plaintiff has appealed from both these orders, and his appeals, in form two but in substance one, have now been argued.

Except as regards the village of Bakewar, which has been the subject of difference between the two Courts below, the facts of the case may be briefly stated: All the villages in suit were at one time the estate of Khuman Singh, the father of Jaswant. Through extravagance or misfortune Khuman fell into poverty and he parted with the villages; whether in fact or only in appearance is matter of dispute in this suit. Jaswant became a successful man of business, and he also rendered active and valuable services to the Government at the time of the Sepoy Mutiny. Thus he became able to repossess himself of the estate

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which Khuman had enjoyed, and the Government acknowledged his services by the grant in question. Khuman died in December, 1844. His eldest son Lal Barian married Adhar Kunwar, a lady of considerable private fortune, and died without issue. Jaswant was the only other son, and he married Kishori as his third wife. He died in August, 1879.

The plaintiff's claim under the grant stands on an entirely different footing from his other claims, and it may be disposed of at once. The sanad of April, 1861, recites the services of Jaswant, and that they had been recognised by the bestowal of the title of "Rajah" and were worthy of further recognition by the grant of a "jagir." It then continues: "Be it known that the possession and jama (revenue) of the five villages granted for generation after generation, shall for ever be given up and remitted, and that the revenue of the seven villages granted for lifetime shall remain under remission till his lifetime, to wit, their zemindars who now pay the revenue to British Government shall pay it to him, and after him they shall ever pay 10 per cent. as malikana allowance to his heir after the deduction of Government revenue, for generation after generation." The five villages are the five villages before mentioned as contained in the deed of gift.

Mr. Ross does not contend that the words "generation after generation" confer any interest less than absolute ownership, nor does he now sustain the contention urged in the Lower Courts that the jama of the five villages did not pass to Jaswant in absolute ownership. His contention is that as regards the seven villages there are two distinct gifts—one to Jaswant for his life, and the other after his death; and that at his death the malikana is given in absolute ownership to the person who may then happen to be his heir. That would attribute to the Government the strange intention of acknowledging the personal merits of Jaswant by conferring a benefit on some unknown heir for whom he might or might not have a regard. The construction also appears to their Lordships to be as strained as it is improbable. They think that the obvious meaning of the expression "his heir for generation after generation" is that the malikana is to form part of his heritable property;

and that whereas he takes the whole income for his life only, he is to take the 10 per cent. malikana in absoulte ownership. Both the Courts below have taken substantially the same view, and the appeal fails on this point.

The next question is whether Jaswant could lawfully give the property in question to his wife. The District Judge states that the point is one on which there has been a great conflict of opinion; and without discussing it further, he says that he follows the latest rulings in holding that if the property comprised in the gift was Jaswant's self-acquired property he could deal with it as he saw fit. The High Court have given no opinion on the point expect so far as an opinion is involved in their affirmation of the District Judge's decree, nor did they hear argument upon it. It was one point of appeal by the plaintiff, but his counsel did not open it till at the very end of his reply, when the Court ruled that it was not competent for him to argue it. In delivering judgment they stated their opinion that the plaintiff, by not addressing to them any remarks in support of this argument, must be taken virtullay to have abandoned it.

Mr. Ross has raised the question again in this appeal, and has addressed to their Lordships a serious argument which requires consideration. His proposition is that a member of an undivided family subject to Mitakshara law has not the power of disposition over self-acquired immoveable property at his will. The Indian Courts have differed on this question, and there is no decision of this Board which after examination of the authorities affirms the power in unqualified terms.

It is not surprising that conflicts of opinion should have arisen, seeing that the texts of the Mitakshara itself, as translated by Colebrooke, whose translation has long been accepted as correct, are apparently and literally in conflict with one another. The passage cited by Mr. Ross is found in chapter I., Section I., clause 27, and is as follows. Speaking of the father of a family, it says that "he is subject to the control of his sons and the rest in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor. Since it is ordained, 'though immoveables or bipeds

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have been acquired by a man himself a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support. No gift or sale should therefore be made.' " And immediately below the commentator insists on a man's duty not to leave his family without means of support. Mr. Ross further points out that the rule so stated as to immoveable property is accepted as law by Sir Thomas Strange : see Vol. I., p. 261 ; Vol. II., pp. 436 and following.

On the other hand, we find in the same source of law quite opposite precepts. In clause 21 of the same chapter and section the comentator quotes two texts, one from Yajnavalkya himself, to the same effect with clause 27 ; and then adds, " they both relate to immoveables which have descended from the paternal grandfather." In Section V. of the same chapter, clause 9, the commentator, speaking of a donation made by a father, says " the son has no right of interference if the effects were acquired by the father " ; and in clause 10 the same precept is repeated with more particularity. So in Section IV., where the commentator appears to be dealing with the principle which lies at the root of the system of joint family property. He there explains what may not be divided ; and in clause 1 he says, " Whatever else is acquired by the co-parcener himself . . . . does not appertain to the heirs . . . . nor shall he who recovers hereditary property which had been taken away give it up to the parceners." Clause 2 enlarges on the same point.

Pausing there to consider the authorities apart from decisions, their Lordships observe that the rule laid down in Section I. clause 27, of the Mitakshara rests upon an ulterior reason, "since it is ordained," and so forth ; and the reason ranges so far beyond the rule as seriously to weaken its support of a positive rule. The necessity of support to children applies in principle to the alienation of moveable property as well as immoveable. And the assertion of rights in those who are unbegotten conflicts with the principle, uncontradicted as their Lordships understand by any decision, that a man may alienate

even his descended estate if he has no child, or at least if he has no co-parcener, in existence. See the cases cited for this proposition in Mr. Mayne's book on Hindu Law, s. 318.

All these old text-books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws. In the preface to his valuable work on Hindu Law Sir W. Macnaghten says: "It by no means follows that because an act has been prohibited it should therefore be considered as illegal. The distinction between the vinculum juris and the vinculum pudoris is not always discernible." (Hindu Law, Principles and precedents, p. vi. of the preliminary remarks.) He illustrates this position by the example of the very subject of the present discussion. It is, as their Lordships think, the most reasonable inference that the passage in Section I. belongs to the former class of precepts, and those of Sections IV. and V. to the latter.

As regards the authority of Sir T. Strange, which undoubtedly is great, their Lordships observe that, though he does not bring the conflicting texts of the Mitakshara into comparison with one another, he introduces similar contradictions into the body of his own work. In his Addenda he correted his own opinions by the authority of Sir Francis Macnaghten's (Considerations on Hindu Law), which work he had seen after he had written his own. He says that he has used Macnaghten's work for supplementing, for correcting, or for confirming his own (Addenda, p. 4). Among the passages which he adopts is the following: "It is desirable that the extent to which a Hindu in his lifetime may give or make an unequal distribution of his property should be ascertained. I think it clear that he has a right to dispose of his self-acquired property, whether moveable or immoveable, according to his own pleasure, and that he has the same right as to ancestorial moveable property." Addenda, p. 8. It seems, then, that Strange intended to accept for Madras the opinion of Macnaghten, who, though a Bengal judge, wrote of the Benares as well as the Bengal school. Macnaghten's opinion, clearly applying to the Mitakshara law, is that the father of a family, with regard to all kinds of property acquired by himself, is at liberty to make

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any alienation he may think fit, subject only to spiritual responsibility.

To turn to the decided cases, there is no decision of this Board which is adverse to the power of alienation claimed by the defendant. Mr. Ross referred to the language of the Board in the *Hunsapore Case* (1), decided in 1867. Sir James Colvile, after shewing that by that time testamentary powers, long disputed, had been established in Hindu law, spoke thus: "Accordingly it has been settled that even in those parts of India which are governed by the stricter law of the Mitakshara a Hindu without male descendants may dispose by will of his separate and self-acquired property, whether moveable or immoveable; and that one having male descendants may so dispose of self-acquired property if moveable; subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants." It is argued that this passage shews that in the opinion of the Board the power of disposition by will does not extend to land, and does not exist if there are male descendants. In that case, however, the Board gave no judicial opinion upon the point, because they held that the property in dispute was an indivisible Raj, subject to the custom of primogeniture, and that, as the heir was a consenting party to the disposition in dispute, the question of the testator's power did not arise. It is true that they did not affirm the proposition now contended for by the defendant.

In the *Bithoor Case* (2) there came into question the validity of a will devising self-acquired property. There was a long and intricate discussion as to the genuineness of the will, which was ultimataly established. It appears also that objection was taken to the legal power of the testator, but it does not appear on what grounds that point was argued. The only passage in the judgment bearing on this question is as follows: "The rest of the evidence consists of the testimony of Pundits, who say that the Soobadar was always obedient to the Shasters, and that the Shasters forbid a father who has several sons to appropriate by will to one the property which by law ought to be equally divided amongst all. It is clear that in this district a

(1) 12 Moore's Ind. Ap. Ca. 38. (2) 9 Moore's Ind. Ap. Ca. 96.

strong feeling prevails among the Brahmins upon the subject of testamentary disposition, which though at length established by law as to self-acquired property, is opposed to the ancient usages and feelings of the country." That was a decision in favour of the power to make such a will ; but the grounds of it do not appear ; the attention of the Board would seem to have been directed to the general question of testamentary power, rather than to distinctions between ancestral and self-acquired estate ; and in the *Hansapore Case* (1) the present proposition was treated by this Board as still open to argument and to qualifications.

Their Lordships do not think it necessary to go through the series of Indian decisions bearing on this point, but they will refer to some of the most important and of the latest date. It appears to them that the subject is one of those in which, from the earliest times, there have been two conflicting principles of law : one favouring the perpetual integrity and the fixed succession of family property, and the other the free use of such property for the circumstances of the day. The controversies and conflicting decisions on the father's powers of mortgage and sale, on the payment of his debts out of the inheritance, and on the testamentary power, will occur to everybody who is familiar with Indian litigations of the past half-century or so. On each of those subjects there has been a growing tendency, coincident with the growth of commerce, to give more effect to the latter of the two principles, namely, the use of property by the living generation, or its living heads. This their Lordships conceive is the kind of change referred to by Lord Kingsdown in the *Bithoor Case.* (2)

The earliest case in which their Lordships have found any exact comparison of the texts of the Mitakshara was decided by a Division of the High Court of Calcutta in the year 1863 ; *Muddun Gopal* v. *Ram Buksh Pandey.* (3) In that case the plaintiff's father had sold to the defendant property which was held to be self-acquired. The learned judges carefully compared the texts of the Mitakshara. They treat those of Sections IV. and V. as

(1) 12 Moore's Ind. Ap. Ca. 38. (2) 9 Moore's Ind. Ap. Ca. 96.
(3) 6 Suth. W. R. 71.

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the governing ones. They conclude: "We must hold that, according to the law as laid down in the Mitakshara, a father is not incompetent to sell immoveable property acquired by himself."

In the year 1872 the question was discussed before a full bench in Calcutta. (1) A son disputed his father's disposition of proporty inherited by the father from a cousin and not from the grandfather. Sir Richard Couch compares the texts and quotes cases which, as he says, exhibit the better opinion among commentators. His conclusion is this: "It is only in respect of property not liable to obstruction that the wealth of the father or grandfather becomes the property of his sons or grandsons by virtue of birth." In this case the property being inherited by the father from a cousin was held to be obstructed as to inheritance.

As regards the North-Western Provinces, the question was carefully considered in the year 1877 by two experienced civilian judges: *Sital* v. *Madho.* (2) Those learned judges did not consider themselves bound by a previous decision of the High Court in 1869, which negatived the father's power to alienate, but without citing the authorities. In their elaborate judgment they make more than one suggestion for reconciling the conflicting texts. They say that the Courts have recognised the principle that the prohibition of certain acts may be implied, yet where it is not declared that there is absolutely no power to do them, those acts, if done, are not necessarily void. And in the end they adopt Sir William Macnaghten's view, "that with respect to personal property, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he (the father) is at liberty to make any alienation which he may think fit, subject only to spiritual responsibility": see Principles, &c., p. 3. This is the same view as is expressed by Sir Francis Macnaghten, and adopted by Sir T. Strange in the passage above quoted.

Their Lordships fully assent to the reasoning contained in

(1) *Baboo Nund Coomar Lall* v. *Razeeooddeen Hossein*, (1872) 10 *Beng.* L. R. 183, 193.

(2) Ind. L. R. 1 Allah. 394.

the judgments they have cited; and they find that in India there is a decided preponderance of judicial authority in favour of the power claimed for Jaswant in this case.

It remains to mention a decision of this Board in the year 1873, which, though it falls under the Mithila law, appears to their Lordships to bear closely on the present case. It is *Rajah Bishen* v. *Bawa Misser*. (1) The Mithila law differs in some respects from that of the Mitakshara, but, on the subject in question, follows it very closely. The leading text-book is the Vivada Chintamani, and their Lordships quote from the translation made in 1863. In p. 76, and again in p. 229, are passages giving a free hand to the owners of self-acquired property. In p. 229 it is written: "Such property as is acquired or recovered by the father without the aid of the ancestral estate shall be divided equally, or unequally, or not divided at all, at his pleasure. The father has full dominion over . . . . that property which is gained by him through skill, volour, or the like—he may give it away at his pleasure," and so forth. In p. 309 occurs this passage: "It is declared in the work called Prakasa that immoveable and biped property, even if it be self-acquired, cannot be sold or given away without the consent of the sons. They who are born . . . . even they who are not yet conceived, require paternal property for their maintenance, therefore it is improper to deprive them of it." The decision of this Board was in accordance with the first set of texts. It is true that p. 309 is not referred to in the judgment, but it can hardly be supposed that in a case fought up to the highest tribunal it was overlooked.

For the foregoing reasons their Lordships have no hesitation in laying it down that the law of the Mitakshara is shewn, after long conflicts of opinion, due to the conflicting nature of the original texts, to be that which has been adopted from Sir William Macnaghten by the Courts of Calcutta and Allahabad.

Such being the law, it remains to apply it to this case. The plaintiff contends that the property in question was ancestral. As regards the four villages, the dispute turns on matters of

(1) 12 Beng. L. R. 430.

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fact, and the Courts below are agreed in finding them against the plaintiff. That dispute cannot be reopened here. As regards Bakewar they have differed, and the plaintiff asks their Lordships to say that the High Court is wrong in finding that this village was the self-acquired property of Jaswant. The question turns on transactions which took place in the year 1852.

In 1836 Khuman, the father of Jaswant, executed a simple mortgage of Bakewar to Lachman Das. In 1839 he executed a second mortgage by way of conditional sale to the father of Kunjbehari. Disputes arose between the two mortgagees, who, under an award, were put into possession each of a moiety. In 1847 Kunjbehari bought out Lachman, and was placed in sole possession. In 1852 one Hurbans Rai, a creditor of Jaswant, who had then succeeded to the property, got a decree against him. In the same year Kunjbehari applied for foreclosure under Regulation XVII. of 1806. The year of grace expired, and the foreclosure became absolute. Hurbans endeavoured to execute his decree against Bakewar, but was opposed by Kunjbehari, who brought a suit against both Jaswant and Hurbans to assert his title. The First Court decided against him, apparently on the ground that his title was no better than that of Lachman, whose simple mortgage did not carry the right to foreclosure or to possession. The Zillah judge thought differently, and held that the mortgage had been finally foreclosed. Hurbans appealed to the Sudder Dewani Adawlat, who upheld the Zillah judge's decree and granted Kunjbehari's claim to have the sale of the estate of Bakewar made absolute by expungement of the name of Jaswant and the entry of his own name. That final decree bears date February 14, 1856. Kunjbehari was then in possession, and he remained in possession, but he did not procure any mutation of name.

The subsequent events are involved in some obscurity. It seems that Kunjbehari got into trouble during the Mutiny; that he was charged with serious offences, and was in great danger of being hung; that Jaswant took up his cause, saved his life, and even gave him compensation to the amount of some thousands of rupees for injuries done to his estate,

On Kunjbehari's part we find that in an irregular way, by indorsement on the decree of February, 1856, he purported to annul that decree in favour of Adhar Kunwar. The consideration stated is the sum of Rs.4526, apparenly less than a year's revenue. That indorsement is dated June 22, 1858. The defendant alleges that soon afterwards Adhar Kunwar, also in an irregular way, made a verbal gift of the property to Jaswant. The certain thing is that about this time Jaswant regained possession and remained in possession until his death. How far his title depeneded on Adhar Kunwar's gift, how far on Kunjbehari's relinquishment of possession and practical reconveyance, and how far Kunjbehari's acceptance of the small sum given for purchase money was influenced by Jaswant's services to him, or why he took so small a sum, are questions which are not, and which need not be, cleared up.

In the year 1868 Kunjbehari sued to establish his right to Bakewar. The defendants were Jaswant and Sheo Narain, to whom it was stated that Jaswant had sold the property. Kunjbehari alleged that the indorsement on the decree was a forgery, and gave a different account of his transactions with Adhar Kunwar; admitting, however, that he took the money from her and that he, as he calls it, annulled the decree. The Subordinate Judge held that the arrangement of June 22, 1858, was a bona fide one, and that Jaswant got actual proprietary possession.

On one of the issues he found that the foreclosure of the decree of February, 1856, and the other previous transactions between Kunjbehari and Jaswant were wholly fictitious and collusive. It is impossible to accept such a finding as of any value. Nobody disputes that Kunjbehari had a genuine mortgage from Khuman, or that the estate and the liability devolved on Jaswant. And the Subordinate Judge himself points out that the validity of the foreclosure was challenged by Hurbans, who had a strong interest to upset it; but he adds," unfortunately these objections were not entertained by any Court."

There is also another finding on a separate issue of a most extraordinary character. The Subordinate Judge finds that because Kunjbehari did not effect a mutation of name, therefore

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his foreclosure decree became void, and that he remanied in possession as a mortgagee.

It is mainly on account of these two findings, on which Mr. Ross dwelt at great length, that this voluminous, intricate, and confused judgment of the Subordinate Judge of 1869 has been put in. Of course they have no legal force as between the heir and the grantee of Jaswant. Nor had they any result as between the parties to that suit, seeing that it was dismissed with costs.

The decision of the District Judge in this case is apparently founded on the last-mentioned finding of the Subordinate Judge of 1869, which he quotes as though it were conclusive. Their Lordships think it clear that the point of time and the event to look at is the foreclosure of 1853. If that were a mere sham, the conclusion that the mortgage continued, and that on its payment Jaswant only redeemed the estate he had inherited from Khuman, might have some colour. But in the suit of 1853 the two appellate Courts held that the foreclosure was genuine and valid. That was held against the appeal of the execution creditor, whose claim was defeated by it. It is not a decision between the present parties, but it is strong evidence, and their Lordships cannot find any substantial evidence for disputing it. If the foreclosure took place, the former title of Bakewar was broken and its ancestral character destoryed. The exact mode of its reacquisition by Adhar Kunwar and Jaswant is not material. For money or for services, it passed from Kunjbehari to Jaswant, and so was acquired by him. For the above reasons their Lordsihps agree with the High Court on this point.

The only other point taken for the appellant is one of a very unusual character. It is alleged that the decree of the High Court is void, because one of the judges, Mr. Burkitt, was not properly appointed. The point was not taken in the Court below, nor is the nature of it explained in the printed case of the appellant. Their Lordships understand that the appointment is questioned on the ground that it was not made immediately upon, or within a reasonable time after, the occurrence of the vacancy which it supplied. Their Lordships cannot

discover any ground for the objection. Under the High Courts Act the Lieutenant-Governor of the North-Western Provinces has power to appoint an acting judge upon the happening of a vacancy among the puisne judges of the Court. No limit of time is mentioned within which the appointment should be made. That is left to the discretion of the Lieutenant-Governor, and it is not competent to a court of law to invent a restriction not contemplated by the Legislature.

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The result is that the appeals fail on all points, and their Lordships will humbly advise Her Majesty to dismiss them. The appellant must pay the costs.

Solicitors for appellant : *Pyke & Parrott.*

Solicitors for respondent : *Ranken Ford, Ford & Chester.*

FAIZ MUHAMMAD KHAN . . . . . PLAINTIFF

AND

MUHAMMAD SAEED KHAN . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

J. C.* 1898 *Feb.* 18, 22; *April* 1.

Will—Construction—Unlimited Gift of Profits of an Estate—Devise of absolute Interest.

An Oudh talookdar gave by will a share of the profits of his estate, which was included in List III. of Act I. of 1869, to the appellant's father:—

Held, that in the absence from the context or the circumstances affecting the property of all evidence of a different intention, an unlimited gift of the profits is equaivalent to an absolute gift of the corpus of the estate ; and that accordingly the devisee took a heritable interest in his share.

APPEAL from a decree of the Judicial Commissioner of Oudh (June 3, 1892) affirming a decree of the District Judge of Rai Bareli (Oct. 9, 1888) and dismissing the appellant's suit with costs.

The facts of the case and the clause of the will under construction are set out in their Lordships' judgment.

* *Present* : LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

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The suit was brought by the appellant as legatee under the will of his son Sultan Khan, the daughter's son of Abdul Hakim Khan, talookdar, of one moiety of the talook of Amawar. The second summary settlement of that talook was made with Abdul Hakim Khan, a sanad was granted to him, and his name was entered in Lists I. and III. prepared under s. 8 of Act I. of 1869. Succession thereto was in consequence entirely governed by the provisions of that Act. Sultan Khan was alleged by the appellant to have been entitled to one-fourth of the talook as devisee under his grandfather's will, and to another fourth as his heir. The appeal related only to the fourth share devised to Sultan Khan; whose title to the other, fourth depended upon an issue of fact concurrently found against the appellant by the Courts below.

The District Judge held that, as regards the share given by the will to Sultan Khan, no proprietary right was conferred and that the remedy given in case a due share of profits was withheld did not justify such a suit as the present.

The Judicial Commissioner (Mr. Dyson) in appeal held that on the proper construction of Abdul Hakim Khan's will of 1873 "the bequest to Sultan Khan was absolute, and not for life only. That being the case, the will set up by his father, the genuineness of which is not contested, is valid, and conveys to him all rights possessed by Sultan Khan. That includes the rights to the profits of the four annas of the estate bequeathed to Sultan Khan." He accordingly remanded the suit for findings as to the amount of these profits.

The District Judge returned a finding that the amount payable in respect of Sultan Khan's share was Rs.1447 8*a*.

To this finding the defendant filed objections, and the case came on again before Mr. Burkitt, who had succeeded Mr. Dyson, as Judicial Commissioner; and now sat with Mr. Howell as Additional Commissioner.

They held that they were not bound by Mr. Dyson's finding as to the construction of the will of 1873, which, in their opinion, only conveyed to Sultan Khan a life estate by way of maintenance. They therefore dismissed the appeal, and confirmed the original decree.

The material portion of Mr. Burkitt's judgment is as follows :

"As to the four annas which appellant claims to have received by devise from his son Sultan Khan, I am also unable to concur with Mr. Dyson, and am of opinion that appellant's claim to it completely fails. The claim as to it was that appellant was entitled absoluetely to a four-annas share in the talooka. At the hearing of this appeal it was stated that appellant claimed only an under-proprietary tenure to the extent of four annas. Such a claim is palpably untenable. All that was left to Sultan Khan was one-fourth share in the *profits* after payment of the Goverment revenue and of the expenses of the talookdari and of the brotherhood. That is to say, that Sultan was to get only one-fourth of what remained out of the collections after deduction of the Goverment revenue and of the expenditure necessary to sustain the talookdar's position. How it would have been possible to have partitioned land sufficient to yield such a varying sum it is difficult to understand. That question, however, need not be considered : firstly because, as pointed out by the District Judge and admitted by the appellant, the suit, as far as partition is concerned, was premature, it being simply impossible that before the institution of the suit defendant could have neglected to distribute the profits or have quarrelled about their distribution. It was only on the occurrence of these events that a right to a partition arose under the will. And, secondly, because Sultan Khan is dead ; and, in my opinion, no right to this four annas survived to his devisee, his father. The grant made to Sultan by the fourth will was, in my opinion, merely a life estate for his maintenance. No words of inheitance of any kind accompany the devise. It is purely and simply a grant to Sultan personally, and not to him and his heirs."

Mayne, for the appellant, contended that Mr. Burkit and his colleague had no jurisdiction to reverse the judgment of Mr. Dyson. On the merits, they were wrong in holding that the share allotted to Sultan Khan was only by way of maintenance for life. According to the true construction of the will, the interest of the four sharers in the estate was equal

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and heritable. The special provision for Saeed only entitled him to be registered owner for the purpose of making engagements with Goverment. The remedy given to the sharers to enforce their interests is not inconsistent with the provision that the estate should continue in the name of Saeed entire and undivided. On the other hand, if it is incosistent, then the latter clause is repugnant to the former and void.

Lawson Walton, Q.C., and *C. W. Arathoon*, for the respondent, contended that Mr. Burkitt was right in holding that, as the devise to Sultan Khan was limited to net profits, it was simply a grant for maintenance which enured for the life of the grantee. It did not confer on Sultan Khan any estate of inheritance which he could transmit to the appellant. Assuming it was a gift of profits, the suit was premature, and could not be brought until there had been failure on the part of the respondent to distribute them.

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April 1.

Mayne replied.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The sole question in this appeal is whether Sultan Khan, the grandson of Abdul Hakim Khan, took under the will of his grandfather a heritable interest in his grandfather's talookdari estate. Sultan is dead, and the plaintiff, who is now appellant, claims to represent him. The estate is one of those which were entered in List III. of Act I. of 1869; which means that, not being one in which the custom of primogeniture had previously prevailed, the tallookdar elected that it should so descend in future. The defendant and respondent Saeed is another grandson of the testator.

The plaintiff claimed a further share in the estate, being that which was devised to Shabhan, a daughter of the testator who died in his lifetime. That claim has been decided against him and is not revived in this appeal. At the hearing the District Judge wholly dismiss the suit, holding that Sultan took no more than a life interest under his grandfather's will. The plaintiff appealed, when the Acting Judicial Commissoner, Mr. Dyson, held that Sultan took an absolute interest; and he remanded the suit for trail of the question (among others), To

what share of profits is plaintiff entitled in the four-anna share of profits inherited by Sultan Khan?

On remand the District Judge found "that two persons have equal rights to this item: one of them is Mussammat Aziz-un-nissa, and the other is plaintiff as representative of Sultan Khan." With that finding the appeal came again before the Judicial Commissioner's Court for final disposal. The Court then consisted of the Judicial Commissioner, Mr. Burkitt, and the Additional Judicial Commissioner, Mr. Howell. Those learned judges held that they were not bound by Mr. Dyson's decision; and, considering that Sultan took only a life interest, dismissed the appeal with costs. That had the effect of affirming the District Judge's original decree which dismissed the suit with costs.

The testator was a Mahomedan gentleman who married two wives and had childern by both of them. His will, which is now to be construed, takes notice that a daughter has just been born to him by his second wife, and then proceeds:—

"I do execute this will, in modification of my will dated 19th September, 1870, and got the same duly registered, so that after my demise the engagement in respect of the ilaka (estate) in its entirety and without division may be made in the name of Muhammad Saeed Khan, son of Mussammat Shahzadi Bibi my eldest daughter by my first wife, and that Muhammad Sultan Khan, son of Mussammat Umrao Bibi my second daughter by my first wife, and Mussammat Moti Bibi my third daughter by my first wife, and Mussammat Shabhan Bibi my fourth daughter from my second wife, may be as equal sharers (with him) entitled to appropriate profits, and that the profits of the said estate after deducting therefrom the Government revernue, talookdari, and Ahl-i-biradri (members of brotherhood) expenses may be divided equally among all the four persons. Let no one act contrary to this. Should any one do so, his act shall be null and void both before the authorities for the time being and the members of the brotherhood. If in case Muhammad Saeed Khan fail to distribute the profits, or raise a dispute over the distribution, each sharer shall be competent to have with the help of the Government set apart for him

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lands yielding his share of profits; but the estate shall continue in the name of Muhammad Saeed Khan entire and undivided."

This will was made on February 1, 1873, and it is not now disputed that all former wills were revoked by it, or that it is the only instrument now to be construed. But it is not unimportant, especially with reference to the arguments founded on the testator's preference of primogeniture for his talook, to see how he had dealt with it by former wills, and what were his actual dispositions immediately before the will of 1873.

The Goverment of India thought it important for the quiet of titles in Oudh that talookdars should be advised to make wills, and Abdul Hakim was so advised as early as October, 1860. In January, 1861, his only issue was three daughters by his first wife, and he provided that Shahzadi, his eldest daughter, should be lambardar in his place, and that his daughters Umrao and Moti should be subordinate co-sharers in equal shares. In the course of that year Umrao gave birth to Sultan; and on October 5, 1861, the testator made a second will, giving the estate to Sultan according to the custom of primogeniture. He directed that his two other daughters, then childless, should get maintenance from Sultan; but with a proviso that if they should not remain on trems of place and concord, his three daughters should be proprietors in equal shares, Sultan being only lumbardar. When the eldest daughter Shahzadi gave birth to Saeed, the testator made a third will dated September 9, 1870. By it he gave his estate to Sultan and Saeed in equal shares and made them joint lumbardars. Also, he directed that his third daugther, Moti, sould get maintenance. The fourth and last will was, as stated, made upon the birth of another daughter, Shabhan.

Their Lordships have heard no reason founded on the language of the will of 1873 for confining the interest of Sultan to a life estate except that the gift is only of profits. But in order to shew that an unlimited gift of profits is less than a gift of the corpus, some evidence should be found in the context or in the circumstances affecting the property. It appears to their Losdships that the context, so far from favouring the restriction of the gift, bears the other way. The testator does

not give the estate to Saeed, but directs that the engagement shall be made in his name. When he disposes of the surplus, after deducting revenue and expenses, he puts all four takers on the same footing—equal shares of profits are given to each. Finally comes the provision that in case of dispute each sharer shall have land set apart for him, only the estate is to continue in the name of Saeed (clearly as lumbardar) entire and undivided. It may be that such a setting apart would be difficult, as the Court below observes ; but the testator clearly contemplated it, and it seems more consistent with a permanent than with a limited interest.

The will then read alone must be construed as giving a heritable interest to Sultan, and it is not shewn from any of his former dispositions that the testator was in the habit of using any of its expressions in any but their ordinary sense, or that he looked upon the gift of the lumbardari as carrying the whole beneficial interest, or that he leant in favour of the rule of primogeniture. On the contrary, in the will of January, 1861, he gives the lumbardari according to primogeniture, and the surplus in equal shares ; in the will of October, 1861, he provides for equality of proprietorship in case of dispute ; and in the will of 1870 he gives the proprietorship, lumbardari and all, to his two grandsons equally.

Their Lordships' attention was called to the fact that the plaintiff is not entitled to the whole of Sultan's share. The District Judge found that Aziz-un-nissa is equally entitled. She is not a party to the suit, and would not be bound by any decree made in it. But their Lordships prefer to confine themselves to a construction of the will on the points argued in this appeal. The plaint, which is rather confused both in its statement and in its prayer, sues for possession of eight-annas share in the talook. A declaration of the nature of the devise to Sultan will enable the Courts to put him in enjoyment of so much of the share of Sultan as has devolved on him in the mode appropriate to the circumstances of the talook. Their Lordships think that the proper course will be to discharge the decrees of the Judicial Commissioner's Court and of the District Judge ; to declare that according to the true construction of

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the will Sultan Khan took a heritable interest in four annas of the profits of the estate after deducting Govrnment revenue, talookdari, and Ahl-i-biradri expenses; to dismiss the suit so far as it seeks relief in respect of the share devised to Shabhan; and to order that neither party shall pay or receive costs either in the District Judge's Court or in that of the Judicial Commissioner; in both of which Courts the plaintiff was right as to one half of his claim, and wrong as to the other half. They will therefore humbly advise Her Majesty to this effect. On this appeal the appellant is wholly right and the respondent wholly wrong. Therefore the respondent must pay the costs.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitor for respondent: *J. F. Watkins.*

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Feb. 17; *March* 5.

RAJA VELLANKI VENKATA RAMA ROW . . . . . } PLAINTIFF;

AND

RAJA PAPAMMA ROW . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Construction—Parol Grant of Village in 1869—*Written Order of Possession—Absolute Interest held to have passed.*

Where in an action of ejectment the plaintiff made title to one moiety of the estate in question under the will of its former owner, and to the other moiety as a gift in 1869 under a verbal family arrangement from his widows who had purchased the same from its devisee, the gift having been followed by an order for delivery signed by the widows:—

Held, that, as this order was not in terms inconsistent with an absolute interest, did not impose any conditions, and was not in its nature revocable; and as the gift of 1869 was not as the law then stood required to be in writing; the plaintiff was entitled to succeed as to the whole.

APPEAL from a decree of the High Court (March 15, 1892) reversing a decree of the Subordinate Judge of Ellore (June 29, 1889).

* *Present*: LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

The subject of litigation was the village of Vundrazavaram, which formed part of the estate of one Raja Naraya Appa Row Bahadur, who died December, 1864, leaving him surviving his senior widow the respondent, and his junior widow Chinnammah, but no issue.

One moiety of the above village was devised to Jagannatha, the appellant's father, by the said Rajah on December 6, 1864; and another moiety to Sura, who was Jagannatha's younger brother.

After the Rajah's death no steps were taken to give effect to the above devise for some years. In the year 1869, however, possession of the whole of the village was given to Jagannatha alone, under the terms of a document dated January 22, 1869, and addressed to one of the estate servants by the two widows Papamma and Chinnammah as follows :—

" Sanction having been given that out of Rs.6400, the annual rent fixed on the village of Vundrazavaram, included in the parganah of Nidudavolu, Rs.3200 should be paid annually to Sirkar, and the balance of Rupees (3200) three thousand and two hundred enjoyed by Vellanki Jagannatha Row Garu as vasati, and that he should be managing the affairs of that village, the management of that village should be delivered to the man sent by him, and arrangements made so that he may get business managed on his behalf.

" If the collections already made for the present year are in excess of R.3200, payable to Sircar, such excess should be made over to him and a receipt taken. But if they fall short of Rs.3200, the deficit should be recovered from him ; and, further, the sum of Rs.3200 should be collected from the ensuing year according to the kists of the parganah.

" Moreover, the water-cess and the road-cess charged according to the rules for that village in proportion to (its) extent should every year be collected through Jagannatha Row Garu himself, and arrangements made for that sum being remitted to the tana. Therefore, the money relating to the said item as may be found due every year according to the account should be collected from him according to the kists.

" We have arranged to collect through him alone, also the

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past arrears outstanding on that village up to date, and this matter, too, is therefore made known to you."

In accordance with this order Jagannatha was put into possession of the village and retained it till 1878, when he was dispossessed by the respondent and Chinnanmah. In February, 1888, he sued in ejectment, making title under the will and the order. The respondent denied that he got possession under the will, and alleged that the village had been granted to him by herself and co-widow as a matter of grace, and because he had promised to wait on them and do their pleasure, he agreeing to pay them Rs.3200 a year as rent, the understanding being that such lease was to continue only for so long as the lessee continued to wait on them and do their behests.

The Subordinate Judge, on the question whether the village had been made over to Jagannatha as a bequest from the Rajah, or as a gift by the widows on personal grounds, considered that they must be held to have done what they could towards discharging the obligation under which they lay to give effect to the will, rather than to have done something on their own account independently of such obligation. He relied on the doctrine laid down in *Lechmere* v. *Earl of Carlisle*. (1)

The High Court reversed this decree and dismissed the suit.

They held that it was clear that nothing had been done under the will of the Rajah, from the date of his death in December, 1864, until the execution in January, 1869, of the order above quoted, which was proved to have been drawn up in the presence of Jagannatha, and to have been approved by him.

They held that the effect of such document was to hand over to Jagannatha the management of the village, coupled with a money grant for his maintenance.

They found that this course was taken as the result of a family compromise, under which Jagannatha and the son of Sura his co-devisee, who was dead, accepted the arrangement thus carried into effect, in place of the gift to them under the will of a half-share each in the said village.

In support of this conclusion they called attention to two

(1) (1733) 3 P. Wms. 211 ; Ca. t. Talbot, 80 ; and see Snell's Eq. 10th. ed. p. 264.

letters, the language of which they held amounted to an "unequivocal admission" that the writer Jagannatha could only hold the village for the remainder of his life, and was liable to be called upon to surrender it at any time at the will of the respondent, which was quite in accordance with the terms of the order.

So far as the title of the appellant rested upon the will of the Raja, the learned judges held that the claim was barred, the suit having been brought twenty-four years after the death of the testator.

Mayne, for the appellant, contended that the High Court was wrong. There was no evidence given to contradict the appellant's case, which was to the effect that the delivery of the village, however long delayed, was made in fulfilment of the terms of the will, which left to the widows no option in the matter. According to those terms the appellant and Sura had an unimpeachable right to the village, and the widows had no right at all. No presumption arose in favour of the respondent's contention that they had ever given up their rights. Delay in enforcing them did not create such presumption, and in the absence of evidence to the contrary the rights granted by the will remained vested in them. The terms of the order signed by the widows were quite consistent with an honest intention at the time to carry out the will. No other intention was proved. It was not disputed that Sura's son consented to the delivery of the entire village to the appellant, and no one else had any interest in the matter. This is not a suit to enforce the will, and therefore the Statute of Limitations does not apply. The defence consists of an attempt to enforce a supposed agreement by the appellant with the widows, of which there is no evidence, and which would have been invalid for want of consideration.

Branson, ane *Harrington*, for the respondent, contended that the appellant's case was that he was suing to recover under the will. That case must be brought before twelve years' dispossession of his rights under the will had elapsed. Apart from the will, the appellant had not made out any title. Jagannatha's

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possession from 1869 to 1878 was a possession at the pleasure of the widows under the order signed by them, which did not grant or purport to grant title. The finding of the High Court was justified by the evidence, which proved that the possession of the village was not under the devise. It was the result of a family arrangement and compromise. It was given in substitution for the devise, and it was determinable at the pleasure of the widows. Even if there were a grant, it was not absolute: see *Baboo Lekraj Roy* v. *Kunhya Singh*. (1) The High Court construed it as revocable. There should be words in the order or circumstances which shew that the grant was of an absolute interest. There is no presumption that there was any intention to enlarge the interest, which alone he would have taken under the will.

Mayne was not heard in reply.

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March 5.

LORD MACNAGHTEN. This suit was brought to recover possession of the village of Vundrazavaram lying within the zamindari of Nidudavolu, which was formerly the property of the zamindar Naraya Appa Row. Naraya died without issue on December 7, 1864, leaving a will which dealt with the zamindari and the village separately.

The suit was commenced in February, 1888. The original plaintiff was Jagannatha, the appellant's father. He died at an early stage of the proceedings, and the appellant was substituted as plaintiff in his stead. The defendants were Papamma, the surviving widow of Naraya, and an infant, also called Naraya Appa Row, whose late father, Ramaya, had been adopted by Papamma some time after the completion of the transaction the effect of which is now in question. The infant Naraya died in the course of the litigation, and on his death his interest became vested in the respondent Papamma.

It is common ground that Jagannatha was in possession of the village in dispute from 1869 to 1879, and that during this period his possession was undisturbed. From 1879 to 1883 he

(1) (1877) L. R. 4 Ind. Ap. 223, 225.

was continually in trouble and litigation with the ryots, who withheld their rents and refused to accept pattas at the instigation, it is said, of Naraya's widows or their manager Venkatadri. In 1883 Papamma, having survived the younger widow Chinnammah, who was Jagannatha's sister, came forward openly and dispossessed Jagannatha.

The sole question at issue is this: In what character or in what capacity did Jagannatha hold the village while he was in possession? Was he absolute owner, as the appellant contends, or was he, as the respondent has variously asserted, tenant for life, or tenant at will, or grantee upon certain conditions for the breach of which he was liable to be dispossessed, or, lastly, was he, as the High Court has held, merely manager under a revocable appointment?

By his will, which was dated December 6, 1864, the day before his death, Naraya gave his zamindari and all his other property to his two wives Papamma and Chinnammah. To Jagannatha and Sura, who were brothers of his junior wife, he gave the village of Vundrazavaram in perpetuity. The testator gave three other villages to Sura's son Venkata Krishna. He enjoined his wives to live in harmony with Venkatadri, whom he described as his younger brother, but whose exact relationship to the testator does not appear. And he gave his wives authority to adopt a relative.

The testator's wives signed the will in token of their consent to abide by its terms, and on December 9, 1864, they sent a copy of the will to the Collector, and notified their intention of acting in accordance with its provisions.

It appears that neither Jagannatha nor Sura took any steps to obtain possession of Vundrazavaram on the testator's death. There was no opposition on the part of the Ranis, nor was there, so far as appears, any unwillingness on their part to carry out the testator's wishes. But Jagannatha considered that he had not been fairly treated by the testator, who had made a more liberal provision for the family of his younger brother, and so he refrained from accepting the bequest in his favour in the hope that the Ranis would increase it. In the meantime the village remained part of the zamindari, and the rents were

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received by or on behalf of the Ranis and went into their treasury.

In 1869, Sura being then dead, and his son Venkata Krishna, who had married Venkatadri's daughter, having succeeded to his rights, the family differences were composed. It was arranged that the entirety of the village of Vundrazavaram should be made over to Jagannatha as from the commencement of the current year with the consent of Venkata Krishna, who was to receive satisfaction for his moiety from the Ranis. The meeting at which the arrangement was completed took place on January 22, 1869. There were present among others Venkatadri Jagannatha, the appellant, and Venkata Krishna, and one Prakasa, the Rajah of Vutukuru, a near relative who is now dead. The Ranis were there too, though of course in their own apartments, and communications took place with them from time to time through Prakasa, the appellant, and Venkata Krishna. Before Venkata Krishna consented to place his moiety at the disposal of the Ranis for the purpose of the arrangement, he was assured by them that he should either have the moiety bequeathed to him by the testator, or receive other villages instead. When he was satisfied, Venkatadri dictated to his clerk an order addressed to the amildar, directing him to make over the management of the village to the person sent by Jagannatha on behalf of his master. The order was then given to Venkatadri. He handed it to Prakasa and then to Jagannatha. They both read it. Jagannatha read it aloud and expressed his approval. It was then taken to the Ranis. They read it and signed it in the presence of Prakasa, the appellant, and Venkata Krishna, and again repeated their assurances to Venkata Krishna. In conformity with this order Jagannatha was put into possession of the village. Nothing further is to be found in the Record about Venkata Krishna. It must be taken that he received adequate compensation in accordance with the assurances that had been given him.

That is in substance the whole of the evidence about the transaction, which resulted in Jagannatha being put into possession of the village of Vundrazavaram. The only witness at the trial who appeared before the Ranis was the appellant

himself. The Subordinate Judge, who observed his demeanour, was satisfied that he was a truthful witness. Neither the respondent nor Venkatadri came forward to contradict him. They were both cited as witnesses for the appellant. But "the former," as the Subordinate Judge states, "threw so many difficulties to her examination on commission that plaintiff was obliged to abandon her as his witness, and the latter was reported to be too seriously ill to subject himself to any examination."

The transaction seems to be a very simple and a very intelligible arrangement if the position of the parties at the time is considered. Jagannatha was entitled to one moiety of the village and one moiety of the rents from the testator's death. His grievance was that the testator had not given him as much as he thought he was fairly entitled to. With the consent of the person entitled to the other moiety the Ranis made over to him the whole of the village as from the commencement of the current year. In the absence of any evidence, it is impossible to suppose that it could have been intended that his interest in the one moiety should be less than or different from his interest in the other. It was not suggested that he should surrender his absolute interest in his own moiety. Sura's moiety was made over to him as an addition to his own. The natuaral inference—and indeed the only reasonable inference that can be drawn from the surrounding circumstances—is that he was to hold the entire village in the same way as he was entitled to hold his own moiety, and that his interest in the two moieties should be commensurate. Such a transaction would be perfectly good as a family arrangement. Jagannatha was put in possession of the whole, and as the law then stood no writing was necessary to vest Sura's moiety in him.

Jagannatha's complaint was that one moiety of the village was not enough for the maintenance of himself and his large family. It is difficult to conceive that he would have surrendered his absolute interest in one moiety for a life interest in the whole, which would have left his family unprovided for at his death. It is equally inconceivable that he would have accepted any interest less than a life interest. The suggestion

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that the village was granted to him on condition of personal attendance on the Ranis, or on any terms involving a right of resumption, is not supported by any evidence.

Of course, if there were anything in the order of January 22, 1869, inconsistent with an absolute interest in Jagannatha it would be a different matter. It would be impossible for the appellant to rely on possession obtained under a document which would have contradicted his present claim. But the order so far as it goes is consistent with an absolute interest in the person in whose favour it was issued. It directs the amildar to deliver up the management of the village to the messenger of Jagannatha, "so that he may get business managed on his behalf." It states, no doubt, that the profits over and above the fixed rent required to cover the proportionate part of the Government revenue of the whole zemindari were to be enjoyed hy Jagannatha as "vasati," that is, for support or maintenance. But it must be remembered that it was just because he complained that the profits of half the village were not enough for the maintenance of himself and his family that he was put in possession of the whole. There is not a word in the order cutting down Jagannatha's interest to a life interest, or to a tenancy at will, or imposing any terms as the condition of his continuing to hold the village.

The whole difficulty seems to have arisen from the singular way in which the appellant insisted in presenting his case to the Court. He would have it that his interest was derived solely and directly from the testator, and that Jagannatha was put in possession in conformity with the testator's will, as indeed the Subordinate Judge held, whereas it is perfectly plain that Jagannatha took Sura's moiety from the Ranis, who purchased it from Venkata Krishna by giving him some equivalent. The respondent, on the other hand, insisted that all parties ignored the will and treated the bequest of Vundrazavaram as a nullity. And so the learned judges of the High Court have held. They say that "for 24 years the will has been ignored, and the estate has not been givin to the first plaintiff," that is Jagannatha, "in accordance with its terms. On the contrary, he himself was a party ro ignoring it." That

seems to their Lordships to be going too far in the other direction. The fact is that the will was plainly the foundation of the whole transaction, though Sura's moiety was derived immediately by gift from the Ranis.

Their Lordships are, therefore, unable to agree with the opinion of the learned judges of the High Court, who seem to have thought that Jagannatha's title to the possession of the village depended simply and solely upon the terms of the order of January, 1869, which they construed as a revocable order committing the management of the village to Jagannatha during the pleasure of the Ranis.

One matter on which the learned judges of the High Court very much relied as confirming their view ought perhaps to be noticed. Some letters were produced which the Subordinate Judge held to have been written by Jagannatha, though there was a dispute about it. They are undated, but they seem to belong to the period when Jagannatha was in difficulties with his ryots. The letter on which most reliance was placed purports to be addressed to his sister Chinnamma. It is abject and servile in tone and incoherent in its language. In it the writer says. "If you and Papamma should now write to say 'you should give up that village' I will do so without entertaining any contrary intention . . . . the longest I should live would be two or three years more, it (the village) will then be added only to your possessions irrespective of any one else. You must take a little trouble and shew an affectionate regard by thinking 'these persons belong to a high family and we will treat them with so much fairness' if you do not think in that manner I only lose my livelihood. I did not wish in the beginning for any right." Then there is a letter to the manager, in which the writer says, "I have prepared and sent an account of some sort. You will after perusing the same write to me how I shall act in the matter of recovering the moneys payable by the ryots. Hitherto I have acted wisely so as to avoid disputes. As it is not possible to do anything without your permission in Vundrazavaram I have expressed my opinion in detail and shall remain at Kadiyam till a reply is received and shall manage in such manner as you tell me to manage." The

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learned judges say that "the words amount to an unequivocal admission that the writer can only hold the village for the short remainder of his life, and is liable to be called upon to surrender it at any time at the will of the Rani." The Subordinate Judge thought that such letters written at such a time were not worthy of serious consideration. Their Lordships are disposed to think so too. The letters were apparently written at a time when the Ranis by their manager were covertly interfering with Jagannatha's possession, and he was maintaining his title by legal proceedings against the ryots. He may well have thought that his sister would not openly declare herself his antagonist or proceed to extremities against him, and that peace might be obtained, at any rate in his time, by abasing himself before the Ranis and their manager.

Their Lordships are of opinion that the judgment of the High Court must be reversed, and that the appeal from the District Judge ought to have been dismissed with costs, and they will humbly advise Her Majesty accordingly.

The respondent will pay the cost of this appeal.

Solicitors for the appellant: *Burton, Yeates & Hart.*

Solicitors for the respondent: *Lawford, Waterhouse & Lawford.*

SUKHAMONI CHOWDHRANI . . . . DEFENDANT ; J. C.*

AND 1897

ISHAN CHUNDER ROY . . . . . PLAINTIFF. *Feb.* 9; *April* 1

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Suit for Contribution—Limitation—Acknowledgment—Payment of Interest—Act XV of 1877, *ss.* 19, 20.

In a suit for contribution by one of three joint debtors against a second who pleaded limitation :

it appeared that the three had petitioned the Court to appoint a manager to protect their joint property by payment of their joint debts, a list of which, specifying the names of creditors and amounts due, was given :—

Held, that this was an acknowledgment within the meaning of the statute ;

it also appeared that the manager had paid interest on one of the joint debts so acknowledged :

Held, that this was a payment within the meanining of s. 20.

APPEAL from a decree of the High Court (Aug. 18, 1893) reversing on a question of limitation a decree of the Subordinate Judge of Tippera (March 28, 1892).

Decrees having been obtained for Rs.80,000 rent of a shikmi talook (i.e., a talook of which the revenue is not paid direct to the Government by the holder, but is paid through the superior landlord) against three members of a Hindu joint family, the talook was attached and ordered to be sold in February, 1885. Stay of execution was refused unless the judgment-debtors deposited in court Rs.50,000. The appellant, one of the three debtors, refused to join in providing any part thereof ; the other two, namely, the respondent and Kalitara, raised the amount in equal moieties and deposited it in court on February 3, 1885, and subsequently the decrees were satisfied. The respondent executed a bond to Kalitara in respect of her contribution of half the appellant's share, was sued upon it, and suffered a decree in respect thereof. Thereupon he sued the appellant on February 24, 1891, to recover her third share of the amount

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deposited. He made her adopted son a defendant, and also Kalitara and her son proforma defendants.

To save limitation the plaint alleged that the appellant had on March 18, 1885, executed a submission to arbitration, the effect of which he contended was an acknowledgment of libility and a promise to pay. It provided in paragraph 10 for a loan out of the joint treasury to the appellant, and paragrapah 17 was as follows :—

"I, Srimati Kalitara Chowdhrani, and I, Issan Chunder Roy, in pursuance of the orders of the High Court in the execution case of Nawab Ahsanulla Khan Bahadur, have borrowed Rs.50,000 upon bonds executed by us, and have deposited the money in court. There are among those debts some which carry compound interest and some which carry a specially high rate of interest in case of default. The manager shall, out of the moneys collected by him from the ijmali (joint) estate, pay in due time those moneys which bear compound interest or a high rate of interest on default; and the manager shall be competent to repay the aforsaide Rs.50,000, with interest and the costs incurred in connection with the borrowing of it, from the moneys collected by him from the ijmali (joint) properties, after he has paid me the money according to the terms mentioned in paragraph 10, or after my refusal to receive the same. None of us shall be competent to object to it, and if any objection is made, it shall be rejected."

In the first schedule thereto are set out the matters referred to, and the third clause of such schedule is as follows :—

"3. The arbitrators shall ascertain the amount of the debts to other persons, incurred for the benefit of the ijmali estate, whether standing in the name of one or two or all of us co-sharers, or for which we are jointly liable on account of the estate, or which may be incurred during the pendency of the arbitration proceedings, and shall determine how long our ijmali estates must continue in the hands of a manager before the ijmali debts of the estates are paid off."

The plaint also alleged a petition dated July 21, 1887, praying the District Judge to appoint a manager to pay off the debts a list whereof was contained in a schedule thereto; further, a

mooktarnamah to the manager, jointly executed by the parties including the appellant, dated January 4, 1888; also various payments of interest in respect of the said debt.

The appellant pleaded limitation, and denied that the documents alleged in the plaint contained either an acknowledgment of debt or an agreement to pay it.

The Subordinate Judge held that, art. 61 of Act XV of 1877 applied, the suit being for money paid for the appellant. Such payment he held was made on April 1, 1885, on which date the superior landlord was allowed to take out of Court the Rs. 50,000 deposited on February 3, 1885. Consequently the suit was barred in three years from April 1, 1885, unless it was saved by any of the contentions on which the plaint relied. In refrence to the first, which was based on the deed of submission, he held—

(*a*) that though the appellant thereby admitted the Rs.50,000 to be a joint debt of all the co-sharers to third persons, and agreed that the same should be paid off out of the joint collections, she nowhere admitted any liability to the respondent, or promised to pay him anything.

(*b*) that the respondent's share of the liability under the decrees obtained by the superior landlord was one-third of Rs.80,000, or Rs.26,666. That of the Rs.50,000 paid into court on February 3, 1885, to stay the sale, he had contributed only Rs.33,333 (being two-thirds of the Rs.50,000), or a sum of of Rs.6,666 in excess of his one-third share of the sum total of the said decrees. That the whole of the said sum of Rs.80,000 was not in fact paid up and satisfied until April 1, 1886, and that therefore on March 18, 1885, the appellant could not be said to have promised to pay to this respondent a one-third share of Rs.50,000.

(c) that in the said agreement there was neither a promisor nor a promisee, that it was ambiguous, and that it was not an admission to the respondent of the identical right which he was claiming now.

As to the second contention, which was that the acknowledgment of the said debt in the petition had given the respondent a fresh starting-point, the Subordinate Judge held

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that, even if it was such an acknowledgment of liability as would give a fresh starting-point, it would not help the respondent, as the suit was not brought within three years of the date of the said document.

As to the third contention, that the power of attorney to the joint manager contained such an admission of the liability of the appellant as would give a fresh starting-point from January 4, 1888, the Subordinate Judge held that it did not contain an admission of such liability, and that even if it did, the suit had not been brought within three years of the date of the document, and that therefore it did not help the respondent.

As to the fourth contention, that a payment of Rs.200 as interest on July 26, 1888, by the general manager on account of the appellant gave a fresh starting-point for the period of limitation, he held—

(*a*) that though the payments of interest had been spoken to by the respondent and by the general manager, the actual dates had not been spoken to by them.

(*b*) that it had not been proved that the appellant made such payments through her authorized agent, the manager, as interest on a debt due to the respondent.

(*c*) that it was not proved that the respondent requested the appellant to pay the said money to his creditors for him.

(*d*) that under s. 20 of Act XV of 1877 payment must be of interest on a debt. That such debt must necessarily be an ascertained sum, and that in this case there was no ascertained debt, and therefore no payment of interest within the meaning of s. 20 could have been made in respect of it.

In appeal the High Court was of opinion that there was not in the said submission any admission that the appellant was liable for any part of the debt, nor was there any promise by her to pay the same, nor could any such promise be inferred from the proviso in the agreement that the manager should pay off such sum out of the income of the joint property.

They were further of opinion that the suit was not one for compensation for breach of an agreement in writing and registered, such as is provided for in art. 116 of Act XV of 1877, but was a suit for money paid to the use of the appellant,

and, therefore, was under art. 61 liable to be barred in three years from February 3, 1885, the date on which the money was paid.

As to the petition to the judge, dated July 21, 1887, the learned judges held that it, taken with the schedule of debts given therein, amounted to a clear acknowledgment of liability on the part of the appellant for the money due to the respondent and sought to be recovered in this suit. But they held that as the suit had not been brought within three years of July 21, 1887, the date of the said petition, it did not prevent the suit from being barred.

They then took up the question of the effect of the payment of interest alleged by the respondent, and held that as the respondent had proved by the oral and documentary evidence adduced, and by the appellant's books, a payment on July 26, 1888, of Rs. 200 on account of interest due on the said debt, the respondent was, under the provisions of s. 20 of Act XV of 1877, entitled to bring his suit within three years of the date of such payment, and that this suit, which was brought as aforesaid on February 24, 1891, was in time.

J. M. Paterson, for the appellant, contended that the petition relied upon with the schedule thereto did not amount in law to an acknowledgment of liability by the appellant within the meaning of s. 19 of Act XV of 1877. [He referred to *Sunkur Pershad* v. *Gowry Pershad*. (1)]. With regard to payment on account of interest, there was no clear and distinct evidence of the date of payment.

Branson, for the respondent, contended that the effect of the agreement of March 18, 1885, was to give the respondent under arts. 61 and 116 of Act XV of 1877 six years from that date. Further, the effect of the agreement, of the submission to arbitration, and of the appointment of a manager, was to prevent the respondent from suing till such arrangement was put an end to by the dismissal of the manager in November, 1888, which date was within three years of suit. On the evidence, the payment of interest on July 26, 1888, was proved, and that gave a fresh starting-point.

(1) (1879) Ind. L. R. 5 Cal. 321.

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J. M. Paterson replied, citing *Sri Raman Lalji* v. *Gopal Lalji*. (1)

1898, April 1. The judgment of their Lordships was delivered by

LORD HOBHOUSE. The appellant and respondent are two co-owners of lands subject to payment of rent. The owner of the rent obtained decrees for a large sum in arrear, and to save the estate from sale the respondent and another co-owner raised a sum of Rs. 50,000 by borrowing from various persons. That sum was deposited in court, and on April 1, 1885, was paid to the judgment creditor. The respondent is plaintiff in the present suit, and is suing the appellant for contribution to the extent of her share in the estate. The only question before their Lordships is whether or no his suit is barred by lapse of time.

The cause of action arose on April 1, 1885. The suit was brought in February, 1891. If the limit of time is three years it would be barred in April, 1888, unless saved by acknowledgment or payment. Both Courts below have considered that the case falls within art. 61 of Act XV of 1877, and the argument here has proceeding on that footing. Without further examining the point their Lordships will take it, in the defendant's favour, that the limit of time is three years.

It is not necessary to discuss more than two of the transactions between the parties. In July, 1887, the co-owners, three in number, presented a petition to the District Judge of Tippera, which was in effect an appointment of one Bhipro as manager for (among other things) the protection of their ijmali (joint) property by the payment of their debts. One of the directions given to him was to apply surplus income "to the payment of the ijmali debts of us three co-owners, of which a list is given below." The list contained the names of twelve persons from whom the money used to pay the judgment creditor was borrowed; the amount due to each being set opposite to his name, and the total brought to the amount of Rs. 56,750.

That is a distinct acknowledgment that the total of the debts

(1) (1897) Ind. L. R. 19 Allah. 244.

comprised in the list is a joint debt. The Subordinate Judge held that the defendant did not thereby admit any liability to the plaintiff, nor promise to pay anything. But it is not required that an acknowledgment within the statute shall specify every legal consequence of the thing acknowledged. The defendant acknowledged a joint debt. From that follow the legal incidents of her position as joint debtor with the plaintiff, one of which is that he may sue her for contribution.

This acknowledgment is still more than three years prior to the suit. To gain a later starting-point of time the plaintiff alleges payments, of which it is only necessary to examine one. On July 14, 1888, Bhipro, the manager, paid Rs. 200 for interest on one of the loans constituting the total joint debt. This is proved by his deposition, and by regular entries in his books, and by endorsements on the creditor's bond. The Subordinate Judge thought that the date of payment was not proved; but it is difficult to see how proof can be more clear or precise. Then he held that the payment was not made for interest on a debt due to the plaintiff, but was made to a third party, a creditor of the plaintiff, and not by his request. Sect. 20 of the Limitation Act says that a new starting-point of time shall be gained when interest on a debt is paid as such by the person liable to pay the debt or by his agent. It does not specify any particular mode or form of payment, and there are many modes in which payment may be made. In this case the common agent of the joint debtors paid interest on the joint debt out of joint funds under express instructions contained in the instrument of his appointment. That is clearly a payment in exoneration pro tanto of the liability of the plaintiff, and such as is contemplated by s. 20 of the Limitation Act.

The Subordinate Judge dismissed the writ on the grounds above indicated. On appeal the High Court reversed his decree, and remanded the case to be tried. As their Lordships agree with the High Court they will humbly advise Her Majesty to dismiss this appeal. The appellant must pay the costs.

Solicitors for appellant : *Tatham & Lousada.*

Solicitors for respondent : *Barrow & Rogers.*

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SRI RAJA RAO LAKSHMI KANTAIYAMMI DEFENDANT

AND

SRI RAJA INUGANTI RAJAGOPA RAO . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Decree—Construction—Judgment admissible to explain Decree.

Where decree of the High Court gave to a plaintiff the full relief claimed by him as a reversionary heir without declaring his title, the judgment may and ought to be looked to in order to ascertain the ground of the decree.

Kali Krishna Tagore v. *Secretary of State for India*, (1888) L. R. 15 Ind. Ap. 186, followed.

APPEAL from a decree of the High Court (March 15, 1892), affirming a decree of the District Court of Vizagapatam (Dec. 19, 1890), which awarded to the respondent the properties claimed by him in his plaint together with mesne profits.

The suit was brought to establish the respondent's right to possession of certain landed estates formerly the property of one Rayadappa, which after his death were first held by his mother, who died in 1886, and thereafter came into possession of his sister, the appellant. The respondent's claim was based exclusively on the assertion that by a decree of the High Court in R. A. 96 of 1875, his right to immediate possession on the death of Rayadappa's mother was finally settled as between himself and the appellant. Both Courts in India adopted the view that this question was res judicata ; whether they were right or wrong was the issue in appeal.

Rayadappa died in 1861. His mother Sitaiyammi succeeded was registered as limited owner, and died in 1886. She improperly alienated some of the estates. Thereupon in 1869, Sitaramaswami, the respondent's father, sued her and her alienees for a declaration of his reversionary title, and that the alienations were either invalid or inoperative beyond her life. Sitaiyammi claimed most of the property as her stridhan. The

* *Present* : LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

District Judge held that it was not stridhan, but that her title was that of mother and heiress of Rayadappa, who had himself inherited it from his father, her husband. He also held that her husband had acquired it whilst separate from his father and brothers prior to the death of the former, and consequently the appellant's father, as son to one of the brothers, was not reversionary heir to Rayadappa. He accordingly dismissed the suit. The High Court reversed this decision, made Sitaiyammi's daughter (the appellant), and also the appellant's adopted son, party defendants, and remanded the case. The District Judge found against the adoption, and again dismissed the suit.

Sitaramaswami appealed and died. His son, the respondent, was substituted as his adopted son, his adoption was questioned, the case was again remanded, and the District Judge found in favour of his adoption. In 1882 the High Court, the findings of the District Court as to the respondent's adoption and the property not being stridhan not being impeached, held that there was no nearer reversioner than the respondent, declared as prayed, with consequential relief.

The decree of the High Court in 1882 was as follows:—

"This Court, in reversal of the revised decree of the Lower Court, doth adjudge and declare that the alienations made by the first defendant to the third, fourth, twelfth, and eighteenth defendants, shall be of no effect beyond and after the life of the said first defendant, and shall be ineffectual to bind the reversioner, viz., the plaintiff's representative the appellant. And this Court doth also order and decree that the original suit do abate as against the second defendant deceased, and that the said suit, in so far as it seeks relief against the fifth, seventh, tenth, eleventh, thirteenth, fourteenth, and fifteenth defendants and in so far as it seeks for an injunction and the appointment of a receiver, be and the same hereby is dismissed. And this Court doth further order and decree that each party do bear his and their own costs in this and the Lower Court."

The reasons for the relief granted to the plaintiff by this decree are stated as follows in the judgment:—

"It is not shewn that there is any nearer roversioner than

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the plaintiff, and we are unable to distinguish this case from others in which it has been held that a reversioner is entitled to a declaration that the acts of a Hindu lady in possession in excess of her authority will not bind the reversion if a case has been made out for such relief."

On the death of Sitaiyammi, her daughter, the appellant, took possession, notwithstanding the above decree of the High Court. The respondent accordingly sued her in 1888, alleging the above decree of the High Court in 1882.

The appellant denied his title as reversionary heir, pleaded that his prayer for a declaration to that effect had not been granted by the High Court, and that he was now barred. The respondent relied on that decree alone, and declined an issue as to his reversionary title, basing his title, exclusively on the decree. The District Judge gave the respondent a decree as prayed, and the High Court affirmed that decree on appeal.

Mayne, for the appellant, contended that the plea of res judicata failed. The decree had not actually declared title, and, therefore, the Lower Court acted wrongly in deciding the respondent's title in his favour without framing an issue and allowing the appellant an opportunity to contest that title on the merits. It was contended that the decree of 1882 neither expressly nor by implication decided that the respondent was entitled to immediate possession on the death of Sitaiyammi, that there was no finding in the judgment which went beyond what was necessary to support the decree; that the Court was neither called upon nor authorized to decide whether the daughter would be entitled to possession after the death of her mother in priority to the nearest made reversioner. Her claim to do so, it was submitted, had never been adjudicated upon, and was wholly unaffected by any thing either in the judgment or in the decree. The respondent was bound to establish in this suit a valid title to immediate possession as against the appellant, and this he had not done. The declaration of reversionary title did not carry with it a declaration of title to possession immediate on the death of the mother, a succession of limited interest being known to the Hindu law

and within the contemplation of a Court dealing with contingent reversionary titles. [Reference was made to *Kathama Natchiar* v. *Dorasinga Tewar*. (1)]

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Branson, for the respondent, contended that it had been established by the concurrent findings of the Courts below that the properties in suit belonged to Rayadappa, that Sitaiyammi succeeded thereto on his death as his mother and heiress, that the respondent was and is entitled thereto as the nearest surviving male sapinda of Rayadappa, the last full owner. His reversionary title was conclusively established by the decree of 1882; but whether res judicata or not, had not been shewn to be open to doubt.

Mayne, replied.

The judgment of their Lordships was delivered by

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March 5.

SIR RICHARD COUCH. The only question in this appeal is what is the effect of a decree of the High Court at Madras made on May 2, 1882, in a suit brought by Sitaramaswami against Sitaiyammi, the mother and heiress of Rayadappa, deceased, who was the son of Ramarayanin, and had died unmarried and without issue. Sitaramaswami was the son of a younger brother of Ramarayanin, and the plaint, which was filed in April, 1869, in the Civil Court of Vizagapatam, alleged that the plaintiff was the nearest surviving heir of Rayadappa, and stated that the relief sought for was a declaration of the plaintiff's right to succeed after the death of Sitaiyammi to the enjoyment of the immovable property described in the plaint and the annexed schedule, and a declaration that the alienations of parts of the property which had been made by Sitaiyammi to the prejudice of the reversionary right of the plaintiff to a number of persons who were also made defendants might be declared invalid, or to be of no effect beyond her life. The plaint also asked for an injunction, and the appointment of a receiver. The written statement of Sitaiyammi alleged that the whole of the property, except a garden which had been granted to her son by the zemindar of Boboli, was her stridhan, and the estate was managed for her by her husband and son;

(1) (1875) L. R. 2 Ind. Ap. 169.

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and even if it was considered to be the acquisition of her husband, her daughter and her daughter's son were entitled to succeed to it, and the plaintiff was not entitled to it in any respect. The other defendants by their written statements asked that the suit might be dismissed. At the hearing before the Civil Judge of Vizagapatam he found that the families of the brothers were divided and the property was not the stridhan of Sitaiyammi, and was the self-acquired property of Ramarayanin, and therefore that the plaintiff was not reversionary heir, and decreed that the suit should be dismissed.

Sitaramaswami having adopted the present respondent before the hearing, he had been substituted in the suit as plaintiff, and he appealed against this decree to the High Court at Madras on the ground, among others, that the Court below ought to have found that he was entitled to the property on the death of Sitaiyammi as heir of her son, the last full owner. It has been seen that Sitaiyammi alleged that her daughter and her daughter's son, and not the plaintiff, were entitled to succeed. The daughter is the present appellant, and on the suit being remanded by the High Court to the Lower Court to enable them to be made parties to the suit that was done, and the judge made a final decree declaring the adoption of the son to be invalid and again dismissing the suit. On the appeal again coming before the High Court it delivered the following judgment: "The Advocate-General admitted that the finding as to the adoption of the substituted plaintiff could not be sustained, and that the only question remaining for disposal was whether on the facts which have been found or are no longer disputed the plaintiff is entitled to any portion of the relief sought. It is not shewn that there is any other nearer reversioner than the plaintiff, and we are unable to distinguish this case from others in which it has been held that a reversioner is entitled to a declaration that the acts of a Hindu lady in possession in excess of her authority will not bind the reversion if a case is made out for such relief." Then, after saying that the Advocate-General had argued that no such case was averred or had been established, the judgment says: "He (the plaintiff) will obtain a decree declaring these alienations ineffectual to

bind the reversion. He has not established any necessity for the appointment of a receiver, and the issue of an injunction to a lady in possession who may alien a property for proper purposes would not be justifiable except under extraordinary circumstances. The residue of the claim is, therefore, dismissed." "Therefore" refers to the reasons given in the preceding paragraph, and "residue of the claim" means the appointment of a receiver and an injunction. The other questions in the suit are in their Lordships' opinion decided in favour of the plaintiff. The decree declares the plaintiff entitled to the substantial relief claimed in the plaint; and although it does not contain a declaration that the plaintiff is the nearest reversioner, the judgment may be and ought to be looked at to see what was decided. The present appellant, in her written statement after she had been made a defendant, alleged that she and her son would be the heirs after her mother's death, and that the respondent could not be the heir. The suit being dismissed by the District Judge, the plaintiff appealed to the High Court, one of his grounds of appeal being that on the death of Sataiyammi he was entitled to the property as the heir of her son. The question whether he was the nearest reversioner was thus distinctly raised.

Sataiyammi died on April 4, 1886, and thereupon her daughter, the present appellant, took possession of the property. On April 18, 1888, the respondent brought a suit against the appellant and other persons, the heirs and representatives of deceased defendants in the original suit, to recover possession. The defence set up by the appellant in her written statement is that the respondent's right as the nearest reversionary heir had not been established by the decree in the suit of 1869, and he was therefore not entitled to recover the estates. The District Judge, on December 19, 1890, found that the respondent was the reversioner, and made a decree for possession against the first defendant Kantaiyammi, the appellant, and dismissed the suit against all the other defendants. Kantaiyammi appealed to the High Court, on the ground that the Lower Court was wrong in deciding the plaintiff's title without framing an issue on that point, and in holding that the decree in the suit of

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1869 had in any way declared the title of the paintiff. This has been the contention before their Lorships of the learned counsel for the appellant. And if only the decree could be looked at there might be some reason for it; but it would be wrong to look only at the decree. In *Kali Krishna Tagore* v. *Secretary of State for India* (1), the High Court of Bengal did this, saying: " We cannot look to the judgment as we were asked to do in order to qualify the effect of the decree"; and their Lordships on appeal held that in order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. They said: " The decree according to the Code of Procedure is only to state the relief granted or other determination of the suit. The determination may be on various grounds, but the decree does not shew on what ground, and does not afford any information as to the matters which were in issue or have been decided. " (2) It is plain that in the suit of 1869 it was decided by the High Court that the respondent was the nearest reversionary heir. That is conclusive between him and the appellant, and is sufficient proof of his title to enable him to recover possession of the property from her. Their Lordships will, therefore, humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The appellant will pay the costs of it.

Solictors for appellant: *Surr, Grimble & Oliver.*

Solictors for respondent: *Lawford, Waterhouse & Lawford.*

(1) L. R. 15 Ind. Ap. 186.

(2) L. R. 15 Ind. Ap. 192.

RASH MOHINI DASI . . . . . PETITIONER; J. C.*

AND 1898

UMESH CHUNDER BISWAS . . . . CAVEATOR. *Feb.* 9. 10; *March* 5.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Evidence—Testamentary Capacity.

Case where, on the balance of evidence in reference to which the Courts below had differed, their Lordships decided that the deceased's widow, who propounded his will, had not discharged the burden of proving that he was at the date thereof possessed of testamentary capacity.

Though the will was fairly simple and not very long, it appeared that the making of it was from first to last the doing of the manager and trusted adviser of the alleged testator. No previous or independent intention of making a will was shewn, and the evidence that the testator understood the business in which his adviser engaged him was not sufficient to justify the grant of probate.

APPEAL from a decree of the High Court (Aug. 19, 1893) reversing a decree of the District Judge of Nuddea (Aug. 10, 1891) which granted probate.

The facts are stated in the judgment of their Lordships.

Cohen, Q.C., and *C. W. Arathoon*, for the appellant.

Mayne, for the respondent.

[The case of *Parker* v. *Felgate* (1) was referred to.]

The judgment of their Lordships was delivered by 1898

LORD MACNAGHTEN. In this case the appellant Rash Mohini *March* 5.
Dasi propounded a document as the will of her late husband Mohim Chunder Biswas, who died on March 18, 1891. The District Judge of Nuddea admitted the document to probate. The High Court on Appeal reversed his decision, and dismissed the appellant's petition with costs.

The sole question in issue before the High Court was the testamentary capacity of the alleged testator.

* *Present* :—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

(1) (1883) 8 P. D. 171.

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After a very careful review of the evidence, from which nothing is omitted, and in which nothing seems to have been unduly pressed, the learned judges of the High Court state the result of their opinion as follows : " We think that the evidence of Dr. Bepin"—Dr. Bepin was a duly qualified doctor who attended Mohim during the latter part of his illness—" aided by the admissions of the plaintiff's witnesses, the history of the illness, and the circumstances of suspicion which arise in the case lead to the conclusion, first, that Mohim is not shewn to have had due testamentary capacity ; secondly, that the balance of evidence in this difficult case is, on the whole, to the effect that he had not testamentary capacity, and that there is no adequate proof whatever that he knew or approved of the contents of the will."

Their Lordships agree so entirely with the conclusions at which the learned judges have arrived, and with their estimate of the evidence, that it will not be necessary for them to go through the facts in any detail.

Mohim died at the age of twenty-nine. Besides his widow he left an infant daughter and two uncles, the younger of whom, Umesh Chunder Biswas, the present respondent, opposed the grant of probate. Mohim had a paralytic stroke on January 24, 1891. A native doctor named Rakhal was called in and attended him for about five or six days. Then he was treated by a kobiraj or native practitioner, whose name does not appear. On March 2 he had another seizure. Two doctors were then called in, Dr. Bepin and a native practitioner called Jasoda. They attended him constantly until his death. It seems to have been drtermined rather against the advice of the doctors that, if possible, Mohim should be moved to Calcutta on the 9th. However, as preparations were being made for his removal, and as he was being carried through the house, he had another seizure, which after a few days proved fatal.

The story of the preparation of the will is told by Khetter Chowdry Khan, a cousin of Mohim, and his manager and trusted adviser. He was the principal, if not the sole actor, in the drama.

It seems that Dr. Bepin, either on the first day of his attend-

ance, or a day or two afterwards, said something about a will. It is not very clear what was said. Khetter states that the doctor said that, considering Mohim's estate, there should be a will made. Dr. Bepin himself asserts that what he said was that, "considering Mohim's condition, they should be ready to get a will executed in case he became at all better." Whatever it was that Dr. Bepin said, Khetter acted on the hint, and set about getting a will made at once. He says he told the patient, "Bepin Babu is saying that you should make a will. . . . Mohim said, 'Let a will be made, and then I shall go to Calcutta.' . . . . I and Mohim consulted together that night. I drew out a list of the properties which were to be included in the will. No one was present there at that time. Neither his wife nor his mother-in-law was asked at the time about it. I did not tell him to ask either his wife or mother-in-law about it. He did not forbid me to speak of it to any one except his uncle and his enemies. I did not speak of it to Mohim's sister and one of his aunts. I did not also tell his wife. I did not speak of it to Mohim's wife and family or any one else, but Mohim spoke of it to his sister and wife on the 24th and 25th Phalgoon (March 7 and 8). There were five executors. I did not let them know before the will. I did not tell Umesh or his sons. They do not speak to me. I made a draft from the note. This was on the 21st or 22nd (March 4 or 5). I have a draft. I handed over the list to Bhusan to keep it with the miscellaneous papers. I made the draft sitting in a corner of the cutchery. Mohim saw the draft on the morning of the 23rd (March 6), after washing his mouth and his hands. No one was present at the time. The doctor went daily from the 20th to the 25th, Jasoda and Bepin used not to go together. I did not tell Bepin Babu, because Mohim forbad me. He forbad me from the 20th. He forbad me, saying, 'Let no one know.' On one occasion he named the doctors, and told me not to tell them. He said to me, 'I do not know whether what you have done will be according to laws; go and get it revised by the pleader of Meherpur.' I sent it on the 24th, through Taruck Biswas. . . . The draft came from Meherpur on the night of the 24th Phalgoon. It contained

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just an alteration here and there. What I wrote was there, but two conditions were added. Besides Abinash Babu I tried to get a draft drawn up by Narahurri Babu; also I tried to do so by means of a letter purporting to have been written by Mohim Babu on the 21st or 22nd. In it I put down paragraphs of the will. Narahurri Babu's draft came by post a day or two after Mohim's will had been executed. It is with Bhusan. Narahurri Babu sent a letter. It is in the Serishta. . . . After Mohim had determined who should be executors, and said, 'These persons are to be the executors,' I did not say anything. He said that on the night of the 20th, when we consulted together. Bepin Doctor came that day. I do not remember whether I or Mohim spoke about the terms of the will. Mohim spoke about the terms. I gave my opinion. I did not myself suggest any of the terms. . . . . It took ten or twelve minutes to read Mohim's will; that was on the night of the 24th. He read it to himself. He read it in a low voice." The story told on behalf of the petitioner further was that Khetter's draft was sent to Abinash, the pleader at Meherpur, on the morning of March 7, by the hand of Taruck, a gumashta in Mohim's empoly. Taruck says that Khetter gave him a letter along with it addressed to Abinash. Then he adds, "Mohim said, 'Take this letter and get the draft corrected by Abinash Babu, and bring it back.' He said, 'There are four executors, and my wife will also be an executrix.' He farther said, 'Rs.300 is set apart for my wife's pilgrimage; it has to be made Rs.600.' He further told me to ask Abinash to keep this a secret, that there may be no row."

Putting aside for the moment this alleged conversation with Taruck and Khetter's statement that Mohim spoke of the will to his wife and sister on March 7 and 8, it will be observed that up to this point no one was in the secret but Khetter. Everything took place between Khetter and Mohim alone. It is not very clear whether Taruck intended to represent that he had a conversation with Mohim in person, or whether he was only repeating what Khetter told him. Either way the story is incerdible. When Khetter was sending written instructions to Abinash, why should he have instrusted part of the testator's

wishes verbally to a messenger? If we are to take it that Taruck had a conversation with Mohim about the will in Khetter's presence, how is it that Khetter says nothing about it?

The will is said to have been executed on the following day, March 8, between 4 and 5 P.M. There seems to be no doubt that on that day there was an assemblage of persons hastily collected by Khetter. All were servants of Mohim except Shama Churn, who was Khetter's brother-in-law, and Rakhal, the doctor who attended Mohim on the first attack. A person was stationed at the door to keep out "enemies," or to give warning of their approach. Mohim was propped up in bed. The will, which had been copied out by one Troilokya, was put into his left hand, over which he still had some power. Troilokya signed for him. He touched the pen. Then Shama Churn signed and read the will aloud. The other witnesses signed, and the ceremony was over. Khetter put the will in his own box. After Mohim's death, "he made known the fact of the will having been made." He handed over the will to the appellant. The appellant and Mohim applied jointly for probate. But Khetter afterwards withdrew his application, at the instance apparently of the appellant's maternal uncle. There were other reasons, he said. He was forbidden to act by Umesh, the respondent.

The will itself is fairly simple, and not very long. The testator begins by stating that Umesh and his son had not behaved well to him: they were behaving so that if he did not appoint any executor in respect of his estate his family would suffer for want of food. Then he gives his wife permission to adopt. He appoints five executors, but no work was to be done otherwise than in accordance with the views of two of them. Then the testator directs that if a son is adopted, his infant daughter and the adopted son should share his property between them; but, until he or she came of age, the estate was to remain in the hands of the executors. In default of an adoption, the daughter was to take all. In the event of the daughter's death, the entire estate was to go to the adopted son. In the absence of both adopted son and daughter, the

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entire estate was to vest in his widow, and, failing her, in the testator's nephew, or any full brother that he might have. Then there were provisions for poor relatives of the testator and of his widow.

It is only fair to observe that under the will Khetter took no benefit directly. He had no interest except as executor. What his motive was it is difficult to see, unless he hoped to secure his position as manager of the estate by becoming an executor. And it may be that he was anxious to exclude Umesh from all hope of succession. He and Umesh seem to have been on much worse terms than Mohim and Umesh. Umesh and his son did not even speak with Khetter. Umesh constantly visited Mohim during his illness, and Mohim, according to Khetter, was very anxious that his visits should not be discontinued.

The oral evidence as to Mohim's testamentary capacity may be summed up shortly. Putting aside the statements of Khetter and Taruck, to which attention has already been called, the witnesses for the appellant state generally that the testator was in full possession of his senses. "That," as the learned judges of the High Court say, "is very unsatisfactory evidence of the patient's condition." "The question," they add, "as to what mental state he was in in reference to the making of a will, his capacity for which is challenged by the defendant's evidence, and is rendered at least a matter for careful inquiry from the facts of his illness in the plaintiff's evidence itself—paralysis on 24th January, an increase of illness on 23rd February, another and severe fit on the 2nd March, indistinct speech, as stated by all the witnesses concerned, increased by the 8th March, according to Shama Churn, so great that according to Rakhal Kobiraj he had to be asked two or three times before his words could be understood. . . . The evidence of some of the plaintiffs just referred to would, if read by itself, convey the impression that Mohim's mind was quite alert and his speech practically free, although a little indistinct, and although he was physically weak and paralyzed. If anything approaching this was the truth, some proof of this might have been adduced, apart from the story common to all those witnesses, in which almost the same things are represented as said about the execution and

about going to Calcutta, and nothing else whatever. The obvious comment on it is that they did not venture to leave this common ground because they were not stating what they remembered, but what it had been agreed should be said; a short story containing some easily remembered incident of a kind which if not closely inquired into by the defendant would lead to a belief on the part of the Court trying the case in Mohim's capacity."

On the other hand, the witnesses on behalf of the respondent deposed clearly and positively to Mohim's incapacity. The most important witness, of course, is Dr. Bepin. He seems to be a person of some position. Khetter himself says, "Bepin is regarded as a good doctor." He is positive that at no time during his attendance could Mohim have made a will. He says, "I used to go and visit him daily for fifteen or sixteen days. Before I went there Mohim was under the treatment of a kobiraj of Mankar. I sometimes used to stop at Mohim's house for twenty-four hours. When I went on the first day, Mohim had but little consciousness. For the first day or two he replied to questions with great difficulty. After that he could not speak at all, but used to try and make sounds. He did not always try to do even this. After I had repeatedly shouted to him, he used to try and make a sound. I saw Mohim on the morning of the day before that on which it was proposed to take him to Calcutta. I went in the morning of the day before that on which it was proposed to take him to Calcutta. As regards Mohim's senses on that day, I only say this, that he could taste food, and he used to weep, and again to wipe the tears from his eyes as he looked at people. He could take down the first part of each spoonful, and the latter part of it had to be withdrawn. I did not hear him speak, and he did not speak to me. He used to be made to sit up in order to be fed. I came away at 10 or 11 that day. I was against his being taken to Calcutta. The reason was that the whole of the brain had become diseased, and if he received any shock the probability was that he would get apoplexy. The next day at 9 or 9½ in the morning I found the patient almost in a moribund condition."

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As regards the testamentary capacity of the alleged testator, their Lordships agree with the High Court in thinking that the oral evidence on behalf of the respondent outweighs the evidence on behalf of that appellant. And in this connection it must be borne in mind that Mohim does not seem to have had any intention of making a will before his illness. It is not like a case in which a testator executes a disposition of his property for which instructions have been given or preparations made while the mind was in vigour.

Apart, however, from the oral evidence, there are several matters which in their Lordships' opinion tell heavily against the appellant. What reason was there for keeping in the dark the two doctors who were in daily attendance on the patient? If it be true, as Khetter says, that Dr. Bepin suggested that a will should be made by Mohim in the state in which he was when he paid his first visit, it would only have been natural that he should have been consulted. No doubt Khetter says that Mohim forbad him to tell the doctors. He looked upon them as "people of the other party," because they were friends with Umesh and attended his family. But then Shama Churn was on good terms with Umesh, and yet Khetter called him in to witness the will, and he was permitted to read it aloud. It is suggested that Mohim was afraid that something would happen if Umesh were told. But what is it that the testator is said to have been afraid of if Umesh had known of the will? Not that there would have been a row, as some of the witnesses said, but, according to Khetter's evidence, only this—that Umesh would discontinue his visits. Then, again, why were not the wife and sister called to speak to Mohim's mental condition at the time the will was made? Khetter says that the testator himself told them about the will on March 7 and 8. It is true that when the plaintiff's evidence was closed the District Judge was asked to let them be examined; but then it was too late. Lastly, it is a very important fact that Khetter does not produce the draft which he says was sent to Abinash and returned by him, nor was Abinash himself called, though he might have thrown some light upon the case.

On the whole, their Lordships are of opinion that the High

Court came to a right conclusion. The making of the will from first to last was Khetter's doing, and there is no satisfactory evidence to shew that the alleged testator understood the business in which Khetter engaged him. The burden of proof rests on the appellant, and she has not discharged it.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellants will pay the costs of this appeal.

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RASH MOHINI DASI v. UMESH CHUNDER BISWAS.

Solictors for appellants ; *T. L. Wilson & Co.*

Solictors for respondent : *Lattey & Hart.*

SRIMATI AKIKUNNISSA BIBI . . . . . DEFENDANT ;

AND

RUP LAL DAS AND ANOTHER . . . . . PLAINTIFFS.

J. C.* 1898 *April* 21, 22; *May* 14.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Ground of Appeal—Refusal to issue a Commission—Act XIV. of 1882, s. 578—Execution of Bond by Purdah Nashin—Onus probandi.

Where in a suit against a purdah nashin on a mortgage bond an appeal was based upon material error committed by the First Court in refusing to allow her evidence to be taken on commission, but it appeared from their judgments that both Courts would have disbelieved her evidence as to non-execution, and in the opinion of their Lordships it could not reasonably have prevailed against the evidence given by the plaintiffs :—

Held, that the error alleged could not have affected the merits of the case, and therefore, under s. 578 of the Civil Procedure Code, it was not an effective ground of appeal :

Held, also, that the High Court were right in holding due execution by a purdah nashin, where her son and her man of business had both attested the bond, and no evidence had been given that it had not been properly explained, or that she was not aware of its contents.

APPEAL from a decree of the High Court (May 4, 1894) affirming a decree of the First Subordinate Judge of Dacca (May 26, 1892) in favour of the respondents.

The suit was brought on May 9, 1891, on a simple

* *Present* : LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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mortgage bond alleged to have been executed by the appellant, a Mahomedan purdah nashin lady.

The written statement raised the defence that she had not executed the bond; had not received the consideration; that no debt of hers had been discharged thereby; that she was not in Dacca at the time of its execution there, but at Ghaghra, in Mymensing; that she was a respectable Mahomedan lady living in seclusion, unable to manage her affairs; that her business was on many occasions transacted for her with her permission by her son Imdad Ali; that she had learnt from the bond in suit and other bonds that her son and "his intimate friend and relation Reza Karim Meah," having treacherously created certain loans, had illegally and falsely fabricated the bond in suit.

A commission was applied for to take her evidence, the procedure in regard to which is stated in their Lordships' judgment.

The Subordinate Judge found that the bond had been read and explained to the appellant; that nearly the whole consideration alleged in the bond had been paid by the respondents according to her directions; that there was no collusion between her son and the respondents; that she was not absent from Dacca at the time of execution, and that Imdad Ali could not have had her falsely personated without her knowledge. As to the objection arising out of her position as a purdah nashin, he said: "The defendat cannot complain that she could not get competent advice. She executed the bond at her own house amongst her servants, friends, and relations, who were quite competent to advise her in the matter."

The High Court's judgment, which is approved by their Lordships as a correct application of the law relating to purdah nashins, is as follows:—

"The defence which is made here is that the mortgage deed was not executed by this defendant at all, but that her name was forged by other people, and so she was not answerable: it is also suggested that even if this is not shewn, the plaintiff has not proved that the transction was ever explained to her so as to make her, under the circumstance of her being a

purdah nashin lady, answerable upon it; and Dr. Rash Behari Ghose further argues that, whether she is answerable for the principal or not, she is not answerable for compound interest, because there is no evidence that the meaning of compound interest was explained to her; and he asks that the case may be sent back in order that she may be called as a witness and give her statement, she never having given her evidence in this case at all.

"The plaintiff's case is a straightforward one. His witnesses prove that this document was undoubtedly executed at the house where this lady lived, and it was registered, I believe, on or about the same date. His account is that the Rs.30,000 was actually produced at the time the mortgage was executed, but that, at the request of the defendant herself, it was taken away by him and was paid by him from time to time to her son and another person, as it was required for the purpose of discharging old liabilities of this very defendant.

"The plaintiff has produced his books, which are kept in a perfectly regular way, and which shew, and shew satisfactorily, that the whole of this Rs.30,000 was paid by him to the persons who are named by the defendant, and that as to Rs.24,000 and odd of it, it was applied in the actual payment of pre-existing debts of the defendant.

"Then it appears that the only person who was called to identify the defendant as the person who executed this mortgage was a person of the name of Reza Karim. Reza Karim says that he was present at the time, that he knew this lady, that he recognised her voice, and that she was the person whose hand he saw sign this document. On the other hand, it appears from his cross-examination that he was actively interested in the preparation of the defence; and another witness for the plaintiff says that on some occasion he said that this woman had not signed this document at all. That fact, taken with the fact that this lady was not called as a witness, raised a doubt in my mind as to whether we should not comply with Dr. Rash Behari Ghose's request and allow her to be examined. Now, the Subordinate Judge was of opinion that she was keeping out of the way and that the

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reasons given for her not being examined when opportunities were afforded her were untrue; and having heard the whole case discussed by the Advocate-General, I think the Subordinate Judge was right; and I think so more particularly for this reason, that this document is witnessed by her son Imdad Ali and her man of business Chunder Kishore, and execution was admitted for her before the Sub-Registrar by her cousin, the witness Reza Karim. It is said that the reason why Imdad Ali was not called by the defendant was that he was the person who forged his mother's name and made away with the money, and therefore he was keeping out of the way. But that remark does not apply to Chunder Kishore; and if there had been anything in this point which is now taken, that this lady wished to give her evidence and was unable to do so, it appears to me that this person would have been called, and he would have shewn that though the document was signed by him, he being her man of business, the document was not properly explained to her, or that she was not aware of its contents.

"Under these circumstances, we cannot say that we think that the learned Subordinate Judge had not come to a proper conclusion upon the whole case; and we do not think that the interests of justice would be served by our sending this case back in order to have this evidence taken, which no doubt would involve the parties in considerable further costs. On the whole, this appeal must be dismissed with costs."

Mayne, for the appellant, contended that these decisions were wrong, and that the well-established rule of law throws upon those who deal with purdah nashin ladies the burden of shewing affirmatively, not only that they might have got competent advice, but that it was actually given them. The High Court both misunderstood and misapplied the law relating to documents executed by purdah nashin ladies. It practically threw the onus on the appellant to shew that the document had not been explained to her, whereas it was for the plaintiffs to shew affirmatively that her execution of the bond was the well understood act of her mind after adequate explanation had been given to her. Then it was material error to refuse to allow

the evidence of the appellant to be taken on commission. He referred to ss. 383 and 386 of the Civil Procedure Code. These sections give to the parties a right to have evidence taken in a particular way. Discretion is given to the judge, which, however, must be exercised in a reasonable way. He referred to *Haridas Baisakh* v. *Mir Moagam Hosseni* (1), a case under s. 175 of Act VIII of 1859. The enabling words in the Code on this subject are compulsory, for they are words to effectuate a legal right: see *Julius* v. *Bishop of Oxford* (2), and see the cases cited in Lord Cairns' judgment on pp. 224, 225.

Branson, for the respondents, contended that there were concurrent findings of fact as to the due execution of the bond in suit. The Courts below rightly held that the appellant had had every opportunity of giving her evidence, and had purposely abstained from so doing. The refusal to issue a commission was not a legitimate ground of appeal under the circumstances, more especially as the denial of the appellant could not prevail, or was shewn would not have prevailed, with either Court against the evidence for the respondents. [LORD WATSON. The only question relating to the refusal is whether injustice has been done by excluding the evidence.] Reference was made to *Doucett* v. *Wise* (3); *Ross* v. *Woodford*. (4)

Mayne, replied.

The judgment of their Lordships was delivered by

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May 14.

SIR RICHARD COUCH. The respondents in this appeal brought a suit against the appellant on a mortgage bond dated a native date corresponding to February 3, 1882, and alleged to be executed by her to secure Rs.30,000 money borrowed with interest at 15 annas per cent. per month (11¼ per cent. per annum), and compound interest on default to be paid at the end of three years. The appellant in her written statement denied the execution of the bond and the receipt of the consideration. She also said that she is a purdah nashin

(1) (1871) 8 Beng. L. R. App. 16.
(2) (1880) 5 App. Cas. 214.
(3) 1 Ind. Jur. N. S. 357.
(4) [1894] 1 Ch. 38.

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SRIMATI AKIKUN-NISSA BIBI *v.* RUP LAL DAS.

Mahomedan lady of respectable family, not able to manage and superintend all her affairs, and on many occasions her son Dewan Imdad Ali, *alias* Nawab Meah, transacts her business with her permission ; that Imdad Ali and his intimate friend and relative Reza Karim Meah and others had previously created certain loans for their own purposes, and afterwards, under the pretext of repaying them, had fabricated the mortgage bond. The suit was heard before the Subordinate Judge of Dacca on April 21, 1892. The mortgage bond was produced and appeared to be signed by the appellant by mark, her name being written "By the pen of Imdad Ali." It was indorsed by the Sub-Registrar as presented for registration on February 4, 1882, and the execution admitted by the appellant at her residence, she being identified by Reza Karim. There were eight witnesses to the execution, two of them being Chunder Kishore Roy and Imdad Ali. The first witness for the plaintiff was Reza Karim. He deposed that the defendant is his cousin, that he saw her and talked to her, and identified her before the Sub-Registrar for registration of the bond which was produced ; he put his signature on the back of the bond, and, the defendant having put a mark on it, he wrote her name on the back of the bond by his own pen ; that the defendant made the impression of the seal on the back in the presence of the Sub-Registrar, and admitted the execution of the bond and receipt of the money covered by it. He also said that Chunder Kishore is the mokhtar of the appellant, and had been so more than ten years, and Hara Kishore Roy is her dewan. The next witness was Dwarka Nath Chuckerbutty, who was in the service of the plaintiffs. He deposed that the bond was executed and registered in his presence : he presented it at the registry office ; the appellant put her seal on it and made her signature by mark ; her name was written by her son Nawab Meah ; he and Chunder Kishore fetched the Rs.30,000 from the plaintiff's house ; it had been arranged that the money should remain in deposit with the plaintiffs, and after the execution of the bond it was taken back and kept in deposit on the appellant's account to pay her debts with it ; that after that Nawab Meah and Chunder Kishore paid off her debts and got evidence

thereof and gave them to the plaintiffs; that the appellant was behind a purdah; at first when he read over the bond to her from a little distance she said, "I could not clearly understand it"; afterwards her son Nawab Meah read over the document to her and explained it to her. The next witness was Mohini Mohun Basak, an attesting witness. He said he had known the appellant for fourteen or fifteen years, or for a longer period; that he had talked to her and knew her voice; that he saw her put her seal and signature to the bond by mark; the money was fetched and shewn to her; he was seated in the room; on the west of the room, where she was seated, there was a purdah on the door between the two rooms; when she executed the bond the purdah was lifted a little on one side and he saw through that opening; the appellant had told him to procure a loan of the money, and said that she would give him brokerage at 1 per cent.; he acted as a broker and procured the loan.

The appellant met this case by witnesses, who deposed that at the time of the execution of the bond she was not at Dacca, and others who deposed that she was on bad terms with Imdad Ali. The Subordinate Judge disbelieved these witnesses, and said there could not be any doubt Reza Karim's evidence was fully true. He accordingly made a decree that, in default of the principal money and interest and costs being deposited in Court on or before a day named, the mortgaged property or a sufficient portion thereof should be sold and the proceeds thereof applied in payment. The defendant appealed from this decree to the High Court at Calcutta, which dismissed the appeal, but it is in her favour that they said not without a doubt.

Chunder Kishore Roy and Imdad Ali, who, it has been mentioned, or witnesses to the execution of the bond, were not called by the plaintiffs. The reason for this appears in the judgment of the Subordinate Judge and ought not to affect their case. He says that the plaintiffs did their best to produce them as witnesses but without success, that Chunder Kishore and Hara Kishore, who had been proved to have been present when the bond was executed, although not discharged from the defendant's service, had mysteriously disappeared some time

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after the institution of the suit, and it seemed to him "very likely that the defendant had screened them with the object that the plaintiffs might not avail themselves of their evidence. Imdad Ali in spite of all the efforts of the plaintiffs will not appear to give his evidence."

The reasons given for the present appeal in the appellant's case and in the argument before their Lordships are: (1) That the first Court committed a material error in refusing to allow the evidence of the defendant to be taken on commission. (2) That the same Court misunderstood and misapplied the law relating to documents executed by purdah nashin ladies. The facts relating to the first reason can be briefly stated. The plaint was filed on April 9, 1891, and the written statement on July 13, 1891. On August 4, 1891, the defendant applied that the evidence of certain witnesses in the list filed by her and her own evidence might be taken by commission, some of the witnesses being females and others residing beyond the jurisdiction of the Court. It appears from the order-sheet of the Court in the record that on that day orders were made for commissions to take the evidence of the female witnesses and the witnesses who were out of the jurisdiction. No order was made as to the defendant's evidence. On April 2, 1892, the defendant applied to be examined by commission at her present residence at Itna, in the district of Mymensing, beyond the jurisdiction of the Court, to which the plaintiffs objected that she should be examined at her permanent residence in the town of Dacca. The judge refused to issue a commission for her examination at Itna, saying that he was not satisfied that she was ill or in such a state of health that she could not be removed to her own residence at Dacca without danger to her life. On May 6, 1892, the defendant made another application to be examined at Itna supported by an affidavit, which application was refused, the judge saying that he had on previous occasions disbelieved the defendant's plea of illness, and still adhered to that opinion; that he was further inclined to believe that the defendant did not mean to comply with the Court's order, but was simply trying to put off the disposal of the suit.

By s. 578 of the Code of Civil Procedure (Act XIV of 1882)

it is enacted that no decree shall be reversed or substantially varied, nor shall any case be remanded on account of any error, defect, or irregularity, whether in the decision or in any order passed in the suit or otherwise not affecting the merits of the case or the jurisdiction of the Court. It is apparent in the judgment of the Subordinate Judge that if the defendant had been examined and had given evidence in support of her written statement he would not have believed it, and, in their Lordships' opinion, it could not reasonably have prevailed against the evidence given by the plaintiffs. The High Court also appears to have thought so, for it says at the end of its judgment it does not think the interests of justice would be served by sending the case back to have the evidence taken. Whether the Subordinate Judge properly exercised his discretion when he refused to issue the commission need not be determined. Possibly it would have been prudent to issue it; but their Lordships are of opinion that the want of the defendant's evidence has certainly not affected the merits of the case.

As to the second ground of appeal, they think the law has been neither misunderstood nor misapplied. They will humbly advise Her Majesty to dismiss the appeal. The appellant will pay the costs of it.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondents : *Lattey & Hart.*

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DAMODERDAS TAPIDAS . . . . . APPELLANT;

AND

DAYABHAI TAPIDAS AND ANOTHER . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF BOMBAY.

Hindu Will—Construction—Indian Succession Act, 1865, *s.* 82—*Absolute Gift.*

By s. 82 of the Indian Succession Act, 1865, made applicable to certain Hindu wills by s. 2 of the Hindu Wills Act, 1870, a besquest of property passes the whole interest of the testator unless it sufficiently appears from the will that only a restricted interest therein is intended to pass.

APPEAL from a decree of the High Court (April 7, 1896), varying a decree of Candy J. (March 28, 1895).

The suit was brought to obtain a judicial construction of the will dated May 26, 1885, of Tapidas Yurjdas, who died on March 31, 1886. It was in the Guzerati language and character. The testator was a Hindu inhabitant of Bombay possessed of considerable self-acquired property. At the date of the will and also of his death, according to the view of facts on which the parties went to trial, his family consisted of his wife Navivahoo, two sons Dyabhai and Damoderdas, two daughters Bai Diwali and Bai Kiki, and a grandson Karsondas, the son of Dayabhai. The widow died on August 12, 1887.

The will was of great length, but the clauses material to this appeal are the 8th, 13th, and 18th.

After providing for various legacies, the will, in the 8th clause, proceeds to deal with certain house property which is described therein, and as to the disposition whereof the will states as follows :—

"Along with all these (appurtenances) I have given (the houses) to my wife Navivahoo, (for her) to enjoy the income thereof. Whatever rent may be received for those houses my wife Navivahoo, herself may take, may enjoy, may spend, and

* *Present* : LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

(she) may make donations for religious and charitable purposes (dharm). She cannot be questioned by my 'executors' and 'trustees' and heirs.

"A 'trust deed' for these houses shall be made and delivered by my 'executors' and 'trustees' and heirs to my wife Navivahoo.

"In the same the authority to take the whole of the income during her lifetime is hers, and these houses cannot be sold and cannot be mortgaged by anyone. On the death of my wife Navivahoo, my sons Bhai Damoderdas and Bhai Dayabhai, both (these) persons, deducting the expenses, may take in equal shares, half and half, the income thereof that may be received, and may enjoy, may expend, and may make donations for religious and charitable purposes (dharm), and the heirs also of both these, my sons, may always take the income from time to time, and may divide and take the income."

The 13th clause is follows :—

"The management (of the business) is being carried on in the name of Sha Tapidas Varajdas & Co., from S. (Samvat), 1928 (A.C. 1871-72). In the same, during the lifetime of my brother Tulsidas, (his) share and my (share), and my son Damoderdas's (share, i.e.), the shares of us three persons were equal. Since the decease of Tulsidas, his share has been discontinued, and the money and such other (property) appertaning to brother Tulsidas's share that may come out of this company, and what may come out of the household accounts in respect of his share, both those (amounts) being added together on payments being made out of the same, in accordance with what is written in brother Tulsidas's 'will,' what may remain over should be received by me according to what is written in the 'will.' Thereafter, in Sha Tapidas Varajdas & Co.'s business there are my two shares, and there is my son Damoderdas's one share. I shall make Bhai Dayabhai a partner in Sha Tapidas Varajdas & Co. in my lifetime. Dayabhai will get a small share therein ; but on my death my sons Damoderdas and Dayabhai, both perons remaining joint, shall carry on the management of the aforesaid Sha Thpidas Varajdas & Co. ; in the same the shares of these two persons are half and half.

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DAMODER DAS TAPIDAS v. DAYABHAI TAPIDAS.

Sha Tapidas Varajdas & Co. are the secretaries and treasurers of the Alliance Cotton Manufacturing Company, Limited. There is received their commission money, which, after my decease, shall be received by my sons Bhai Damoderdas and Bhai Dayabhai, both persons in equal shares by both brothers, half and half; but if my son. Bhai Damoderdas, should not make Dayabhai a partner, in accordance with what is written above, and should not annually give him an equal moiety out of the commission money of the Alliance Cotton Manufacturing Company, Limited, that may be received annually, then, out of my property of all descriptions and moneys, he shall first give Bhai Dayabhai Rs.200,001, namely, two lakhs and one. For this money a legal 'trust deed' shall be made, and with the same money, 'estates,' or Government loan 'notes,' bearing interest, shall be purchased and given. Whatever income the same may yield, Bhai Dayabhai shall take; and in the event of his decease, Bhai Dayabhai's heir or heirs shall get (the same). Afterwards, on what is mentioned in this 'will' being given to all, as to the whole of the property which may remain over, my sons, Bhai Damoderdas and Bhai Dyabhai, may divide and take the whole in equal shares, and if God should bring it to pass, and a son should be born to my wife Navivahoo, then (the property) shall be divided and taken in three shares. None of such sons as may be born to both (these) my sons can ask for (or demand anything) during the lifetime of both these (my) sons. In the event of their (my sons) decease, they (their sons) are their heirs. With regard to what I have mentioned in this 'will,' and have given to my sons two persons, and all that I have particularly specified in this 'will' in accordance therewith, my sons Bhai Damoderdas and Bhai Dayabhai, both brothers shall divide and take (their) shares, and in the event of the decease of both (my) sons, the sons of him who may have (left sons) are the heirs, in every respect of his father's property, and if either of (my) above-mentioned two sons should not have sons in his lifetime, then, in the event of his decase, my other son who may be living shall get all (namely his) estate and ready money and whatever else there may be. In regard to the same, no son can raise a dispute, and if one of

my two sons should have daughters, then, should there be one or more daughters, Rs.25,000, namely, rupees twenty-five thousand, shall be given to her (or to them), and to my son's wife Rs.15,00, namely, rupees fifteen thousand, shall be paid. As to the residue, such son of mine as may be living shall get all that is given by me, and in case that son should not be living, and should he have a son or sons, he (or they) shall get all in accordance with what is mentioned above. No one can raise a dispute or an objection in regard to the same."

The 18th clause is as follows :—

"On the 'legacies' and 'estates' and other (property) mentioned in this 'will' to be given being given according to what is written in this 'will,' and on the religious and charitable donations (dharmada) being set apart, I, of (my) free will and pleasure, give the immovable and movable property, the (personal) ornaments and jewelry of all kinds, and the ready money to my two sons Damoderdas and Dayabhai. They may divide and take all that property in equal shares. But if God should bring it to pass, and a son should be born to my wife, then (the property) shall be divided and taken in three shares; or if a daughter should be born, then (a legacy) shall be given to her in the same way as I have written in this 'will' (directing legacies) to be given to my daughters, Diwali and Kiki. In regard to that no one shall raise any kind of objection or dispute.

On November 6, 1894, Dayabhai sued his brother as first defendant, now appellant, and his son as second defendant, now co-respondent, for the purpose above mentioned; the rival contentions being shewn by the following issues :—

1. Wnether the plaintiff and first defendant take an absolute estate as tenants in common in the house property recited in clause 8 of the will after the death of Navivahoo.

2. Whether on the death of Navivahoo the interest of the testator in the said houses was undisposed of by the said will.

3. Whether under clauses 13 and 18 of the said will the plaintiff and first defendant took an absolute interest as tenants in common in the residue of the testator's estate.

4. Whether on the death of Navivahoo the interest of the

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testator in the houses recited in clause 8 of the said will fell into the residue of the testator's estate.

5. Whether the second defendant is not absolutely entitled to the houses and property referred to in clauses 8, 13, and 18 of the will after the death of the plaintiff and the first defendant.

6. Whether the plaintiff and first defendant have any power and right to alienate the said houses and property beyond the term of their natural lives.

Upon the first and second of these issues Candy J. decided that, under the 8th clause of the said will, Damoderdas and Dayabhai took, upon the death of the said Navivahoo, a life interest only in the houses in this clause mentioned, and that the rest of the estate and interest in the said houses was undisposed of and fell into the residue.

Upon issues 3 and 4 he held that the two sons of the testater took an absolute estate as tentants in common in the residue under the provisions of clauses 13 and 18 of the said will, subject to the interest of the said Damoderdas being defeasible, if he should die without having a son born to him in the lifetime of his brother.

Upon the 5th and 6th issues he stated that the Court could not say what the interest of the second defendant Karsondas would be in the said property while the two sons of the testator were both alive, but that the two sons had power to alienate the houses and property beyond their lives, subject to the proviso that the interest of Damoderdas was defeasible in case he should die without having had a son born to him in the lifetime of his brother.

In appeal the High Court said :—

As regards clause 8, "we think that Candy J. is correct in holding that under this clause Damoderdas and Dayabhai take a life interest only in the houses as tenants in common, and that the ulterior interests therein not being validly disposed of, fall into the residue. Though the gift of the income of property in general terms carries with it a gift to the property itself, yet that is only when the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration (Indian Succession Act, s. 159). Here the power of disposition

over the income given to Damoderdas and Dayabhai is in identically the same terms with the power of disposition over it given to the widow (who clearly had only a life estate given to her), and the testator manifests his wish that the heirs of each son should enjoy the income in the same way as the sons. The use of the word 'also,' in connection with the heirs, seems to us to indicate an intention on the part of the testator that their enjoyment should be something distinct and separate from that of the sons.

"On the whole we think that the testator, when he gave the income of the houses to his sons equally, did not intend to give to them the houses themselves, but desired that their enioyment of the houses should be in point of time, co-extensive with their respective lives."

As to the extent of the interest taken by Dayabhai and Damoderdas, the High Court held that the sons took only life estates in the property forming the residue under clause 13 and the devise under clause 18, and that the words in clause 13, "In the event of their (my sons) decease, they (their sons) are their heirs," should be interpreted as a limitation in favour of or as a gift to the sons.

With regard to the effect of the gift over and under what circumstances it takes place, the High Court held that "it comes into effect if either of the brothers die without having or having had sons."

The High Court concluded as follows: "The result then is this: Damoderdas and Dayabhai each take a life estate in a moiety or half-share of the residue. The reversion of Dayabhai's share is now vested in his son, Karsondas, and as to that share no further question arises.

"If Damoderdas die without leaving a son his moiety will devolve upon hss brother Dayabhai, or, if Dayabhai be then dead, on Karsondas. It would be premature for us to determine what will be the result if Damoderdas shall have a son. We can make no declaration as to the rights of such son (if any) which would be binding on him," (? or) "as to the rights (if any) of any further sons of Dayabhai, if he should have other sons."

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When, however, the minutes of the decree were being spoken to, it was brought to the notice of the Court and admitted that, as a matter of fact, Damoderdas had had two sons born to him in 1873 and 1881, both of whom had died in early infancy.

Thereupon, after reargument, the Court held that, seeing that at the time of the making of the will Damoderdas had had sons who were then dead, the correct and sensible interpretation to put upon the words translated by the Court translator as "and if either of my above-mentioned two sons should not have sons in his lifetime," was to say that they should be read "if either of my above-mentioned two sons should not, at the time of his death, leave issue sons," and that, accordingly, their judgment should stand, the concluding paragraph being altered as follows :—

"Damoderdas and Dayabhai each takes a life estate in a moiety or half-share of the residue . . . . It would be premature for us to determine what will be the result if Damoderdas shall have a son. We can make no declaration as to the rights of such son (if any) which would be binding on him, or as to the rights (if any) of any futher sons of Dayabhai, if he should have other sons."

Cohen, *Q.C.*, and *Mayne*, for the appellant, contended that on the true construction of the above clauses the High Court ought to have held that the two sons of the testator took an absolute interest at the death of Navivahoo in the houses comprised in clause 8, and also in the residuary estate comprised in clauses 13 and 18. The limitations over, on the happening of a contingent and uncertain event, are void ; and so are gifts to persons not in existence when the gift should take effect. Reference was made to the Indian Succession Act, 1865, ss. 111, 112, and 118, *Alanga-Monjori Dabee* v. *Sonamoni Dabee* (1), *Norendranath Sircar* v. *Kamalbasini Dasi* (2), and the *Tagore Case*. (3) If the absolute estates granted by s. 13 are defeasible on the death of either son leaving no issue, then the word "issue" should be so construed as to include adopted as well

(1) (1882) Ind. L. R. 8 Calc. 637 (2) (1896) L. R. 23 Ind. Ap. 18.
(3) (1872) L. R. Ind. Ap. (Supp.) 47.

as natural-born issue. It was contended that if either son died without issue, the surviving son took the whole, but that it was not the intention that the survivior should exclude the issue of the deceased. The time of distribution was not the testator's death, but the death of the son who died first; and it would be worng to make a declaration till the period of distribution was ascertained. But it was contended that the two sons took absolute estates which were originally or had since become indefeasible. The words "have issue sons" meant, as the High Court originally held, "have or have had issue sons." There was no reason for saying that it meant, "leave issue." If, on the contrary, the High Court was right in holding that life estates only were given by clauses 13 and 18, then it followed that the residue of the estate was undisposed of, and passed at once to the sons as intestate inheritance. With regard to the words in clause 13, "that the sons are the heirs of their father's property," it was contended, first, that if the High Court was right in holding that they were words of gift, then the gift was void as being to persons not necessarily in existence at the death of the testator. Secondly, if the words were taken as a direction that only sons should inherit their father's property, such a direction was void as opposed to the Hindu law and inoperative.

Jardine, Q.C., and C. W. *Arathoon*. for the first respondent, the plaintiff Dayabhai, contended that the High Court was right, for the reasons stated in their judgment, in holding that the appellant did not take an absolute and indefeasible estate in his moiety of either the house property disposed of by clause 8 or of the residue disposed of by clauses 13 and 18. It does not always follow that a gift is always void because it is to an uncertain class. It was held in *Ram Lal Sett* v. *Kanai Lall Sett* (1) that where the intention of a donor is to give a gift to two named persons capable of taking that gift, although it is also his intention that other persons unborn at the date of the gift should afterwards come in and share therein, the part of the gift which is capable of taking effect should be given effect to, notwithstanding that the intention of the donor

(1) (1886) Ind. L. R. 12 Cal. 663.

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cannot be carried out in its entirety. See also *Rai Bishen Chand* v. *Asmaida Koer* (1); Mayne's Hindu Law, ss. 354, 356; Indian Succession Act, 1865, s. 102. The period of distribution here is the death of the testator, and the effect of the whole will is that the sons took life interests. In any event the respondent, who had a son living at the testator's death, is in a more favourable position, having regard to the words of the will, than the appellant, who had no son then living.

Cozens-Hardy, Q.C., and *Branson*, for the respondent Karsondas, contended that the High Court were right in holding that under clause 8 the two sons of the testator took only a life interest as tenants in common in the property dealt with by that clause. The ulterior interest in that property fell into the residue. Then with regard to the disposition of the residue the High Court were right in holding, according to the true construction of the will under all the circumstances of the case, that under clauses 13 and 18 the two sons of the testator take each a life interest in a moiety of the residuary estate, and that if either of the brothers die leaving no son, then his moiety shall devolve on his brother; or if the brother shall be dead leaving male issue, such male issue shall take the whole.

Cohen Q.C., replied.

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The suit in this appeal was brought to obtain a judicial construction of the will of Tapidas Varajdas, a Hindu inhabitant of Bombay, who died on March 31, 1886, leaving a widow Naviviahoo and two sons, the respondent Dayabhai and the appellant Damoderdas, and two daughters. Dayabhai had then two sons living; Damoderdas, had two infant sons, who died before the date of the will. The widow Navivahoo died on August 12, 1887.

The will is dated May 26, 1885, and is a long document in Gujerati, divided into numbered paragraphs. The 8th, 13th, and 18th are the only parts of it which it is necessary to refer to in this appeal.

The suit was brought by Dayabhai against Damoderdas and

(1) (1883) L. R. 11 Ind. Ap. 164, 178.

Karsondas, one of the sons of Dayabhai ; and the plaint, after stating the making of the will and the death of the testator, stated that the residue of his estate, except the houses and land at Surat, had been divided, and was then being enjoyed in severalty by the plaintiff and the first defendant, the houses and land at Surat being enjoyed by them jointly. In the written statement of Damoderdas the facts thus set forth in the plaint were admitted, and it was contended that he and Dayabhai took an absolute estate as tenants in common in the houses mentioned in clause 8, and in the residue of the testator's estate under clauses 13 and 18. Karsondas in his written statement contended that he was absolutely entitled to the houses and the residue of the property referred to in clauses 8, 13, and 18, after the deaths of Dayabhai and Damoderdas.

The original Court and the Appellate Court have both held that Damoderdas and Dayabhai took a life interest only in the houses as tenants in common, and that the ulterior interests therein, not being validly disposed of, fell into the residue. On the argument of the appeal before their Lordships this was not disputed, and the contention related only to the construction of clauses 13 and 18. Sect. 82 of the Indian Succession Act, 1865, enacts that where property is bequeathed to any person he is entitled to the whole interest of the testator therein unless it appears from the will that only a restricted interest was intended for him. This section is by s. 2 of the Hindu Wills Act, 1870, made to apply to wills made by any Hindu in the town of Bombay. and their Lordships have some doubt whether in the 8th clause it sufficiently appears that the sons were to take only an estate for life. It is, however, in the view which their Lordships take of clauses 13 and 18, unnecessary to determine it.

In the 13th clause the testator, after referring to the business carried on in the name of Shah Tapidas Varajdas & Co., in which he had two shares and Damoderdas one share, and his intention to make Dayabhai a partner, says that in the event of his decease the sons remaining joint shall carry on the business, their shares being half and half, and the commission is to be received by them in equal shares. " But if my son

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Bhai Damoderdas should not make Dayabhai a partner in accordance with what is written above, and should not annually give him an equal moiety out of the commission money of the Alliance Cotton Manufacturing Company, Limited, that may be received annually, then out of my property of all descriptions and moneys he shall first give Bhai Dayabhai Rs.2,00,001, namely, two lakhs and one." Then he says, " afterwards on what is mentioned in this will being given to all as to the whole of the property which may remain over, my sons may divide and take the whole "; and then follow the words which have been held by the High Court to give to the sons only a life estate in a half-share of the residue. It appears to their Lordships that the latter part of the clause beginning " afterwards" is intended to apply to the case of Dayabhai not becoming a partner in the business and receiving from Damoderdas Rs.20,001. According to the plaint and the admissions in the written statements, the whole of the residue of the estate except the houses and land at Surat has been divided between the sons, and is now enjoyed in severalty by them. There is no statement or any ground in the plaint or written statements for supposing that Dayabhai has received the two lakhs and one rupee. Clause 13, therefore, does not appear to their Lordships to be applicable in the circumstances which have arisen, and it may also be observed that what has been said about s. 82 of the Succession Act with reference to the 8th clause is applicable to clause 13. It may be doubted whether the words which follow the direction that the sons may divide and take the whole of the residue in equal shares are so clear as to shew that only a restricted interest was intended to be given to them. In their Lordships' opinion clause 18 is that which is now applicable to the residue, and there is no difficulty in its construction. It gives the residue to the sons in equal shares absolutely except in the case of the subsequent birth of a son or a daughter. Their Lordships cannot agree with the Appellate Court in thinking that the two clauses must be read together and reconciled, and must be treated, not as antagonistic, but as mutually explanatory of each other. They are intended to provide for different circumstances. They will

humbly advise Her Majesty to reverse the decree of the High Court, except the order therein as to the costs of the suit, and to declare that Damoderdas and Dayabhai each took an absolute interest in a half-share of the residuary estate of the testator. The costs of this appeal of both parties, to be taxed as between solicitor and client, will be paid out of the property of the testator.

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Solicitors for appellant : *Payne & Lattey.*

Solicitors for both respondents : *T. L. Wilson & Co.*

HAKIM MUHAMMAD IKRAM-UD-DIN . DEFENDANT ;

AND

NAJIBAN . . . . . PLAINTIFF.

ON APPEAL FROM THE HICH COURT AT ALLAHABAD.

J. C.* 1898 *April* 21 ; *May* 14.

Mahomedan Law—Deed of sale followed by Possession—Non-payment of Price —Purdah nashin—Execution—Absence of independent Advice.

Where a Mahomedan wife, by deed of sale executed shortly before her death, purported to sell certain villages to her husband and made over possession thereof, but no portion of the price was proved to have been paid :—

Held, that there being no evidence of any intention on the part of the wife to make a gift, and no suggestion in the pleadings to that effect, and no evidence of an intention to release the husband from payment of the price, he remained accountable for the same :

Held, further, that absence of independent advice did not raise a presumption of undue influence when the wife was shewn to be capable of managing her affairs and to have understood the transaction ; no case to that efiect having been made by the pleadings or issues, and no evidence of improvidence in the sale or inadequacy in the price having been given.

CONSOLIDATED Appeals by the same appellant from duplicate decrees of the High Court (Jan. 7, 1891) one of them by special leave, which decrees were passed in the same suit modifying a decree of the Subordinate Judge of Bareilly, January 23, 1889.

The facts are stated in the judgment of their Lordships.

* *Present* :—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

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The appeal related exclusively to the mouzahs Jabida and Pachtaur, which were the subject of a deed of sale by the deceased Imami Begum to her husband, the appellant. There were concurrent findings of facts that Imami and the two plaintiffs were daughters of Waziran, and no appeal from the High Court's finding as to their illegitimacy, with the result that, according to Mahomedan law, the plaintiffs were entitled to one-half of her estate, and the appellant, as her hushand, to the other half. The question decided was whether by virtue of the deed the two mouzahs had been transferred to the appellant during her lefetime, or whether at her death they still formed part of her divisible estate.

The 4th paragraph of the plant was "that should the defendant prove the sale of mouzahs Jabida and Pachtaur to be genuine, the sale consideration thereof, instead of possession, may be awarded to the plaintiffs against the defendant along with the movable property."

With regard to the deed of sale, there were concurrent findings of fact as to the execution by Imami of a general power af attorney in favour of her husband, dated November 2, 1887, of the sale deed dated November 9, 1887, in his favour, and of a special power of attorney under which mutation of names was effected, from herself to her husband.

But both Courts were also of opinion on the evidence that no real consideration passed. The Subordinate Judge, however, upheld the validity of the transfer in these terms: "But since the vindor was the absolute owner of the property with full powers of alienation, and a voluntary transfer of the property by her in a sound state of mind is proved by her valid declarations in registered documents which have been proved, and also by corroborative oral evidence unrebutted by the plaintiff, who failed also to prove that all those proceedings were taken when the vendor was in a state of intoxication, and without her knowledge or against her will, such transfer is by all means legal, and under the Mahomedan law valid and enforceable, irrespective of the question of payment or non-payment of the consideration money. By executing another registered power of attorney dated November 24, 1887, the vendor filed

through her mokhtar an application for mutation of names in respect of the property sold in the Revenue Department, and obtained mutation of names, that is, she even duly put the said contract in force."

On the other hand, the view taken by the High Court of this transaction is thus expressed: "If Imami Begum really understood what the transaction was, it was not the transaction which was evidenced by the sale deed, i.e., a transaction of sale; it was not the transaction which the defendant in his pleadings and evidence put before the Court. Although this lady could not fairly be described as a drunkard, she undoubtedly had impaired her health by drink. She was a person very liable to be influenced by her newly married husband, who was many years her junior, and although she might have desired to confer a benefit on him, either by making a free gift of those villages to him or by transferring them to him for an inadequate consideration, still I think we ought not to give Ikram-ud-din a decree in respect of those villages unless, having regard to the circumstances, we are satisfied that this old lady had independent advice, and thoroughly understood what she was doing on that occasion. It has not been shewn to us that this lady had independent advice; and under these circumstances, and having regard to the doubt and mystery in which Ikram-ud-din himself has involed the transaction of November 9, 1887, I think we should hold that Ikram-ud-din has not made out a title other than his title as heir of his wife Imami to these villages or any part of them."

The Subordinate Judge, whose decree was based on a finding by him that Waziran's daughters were legitimate, gave the respondents four-sevenths of the estate in suit, except the two mouzahs aforesaid, in reference to which their suit was dismissed. The High Court gave them a moiety of the whole estate in suit including the two mouzahs.

The material part of the High Court decree was "that the plaintiff to recover possession of one moiety of the properties specified below, together with mesne profits in respect of the zemindari estate up to date of possession, the amount whereof shall be determined in the Execution Department,

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and that the residue of the plaintiff's claim be and is hereby dismissed."

Cozens-Hardly, *Q.C.*, and *Cowell*, for the appellant, contended that the decrees of the High Court should be modified, and that the appellant's exclusive title to the mouzahs in question should be declared, and the mouzahs themselves excepted from Imami's divisible estate. There were concurrent findings of fact as to the execution of Imami's deed of conveyance. The evidence shewed that it was intended to operate as a transfer of proprietary right, and was followed by transfer of possession. The Subordinute Judge was right in disregarding in that state of facts the form of the transaction. Proof of payment of the consideration was not necessary to its validity; the intention to transfer followed by change of possession being all that was necessary under Mahomedan law. There was no evidence of undue influence, no concealment, and no necessity for independent legal advice. Imami was shewn to have thoroughly understood and intended the transaction. Reference was made to *Nedby* v. *Nedby* (1); *Ranee Khujooroonnissa* v. *Mussamat Roushun Jehan* (2); *Kamar-un-nissa Bibi* v. *Hussaini Bibi* (3); *Rujabai* v. *Ismail Ahmed* (4); *Mahomed Buksh Khan* v. *Hosseini Bibi*. (5)

Mayne, and *Ross*, for the respondent, contended that the High Courts was right in refusing to give effect to the deed of sale as if it were a deed of gift. The appellant was in a fiduciary position to Imami as the holder of her power of attorney. Imami ought to have had independent advice, and she was not shewn to have understood the transaction, at least, that it was something entirely different from what was expressed. If she understood anything she was giving her consent to a sale, whereas it is now contended that she consented to a transaction of gift. Besides, the appellant in his plaint and evidence relied upon a sale, not on a gift; and payment of the price has been concurrently found against him.

(1) (1852) 5 De G. & Sm. 377.
(2) (1876) L. R. 3 Ind. Ap. 291, 307.
(3) (1880) Ind. L. R. 3 Bomb 266.
(4) (1870) 7 Bomb. H. C. R. 27.
(5) (1888) L. R. 15 Ind. Ap. 81

He cannot be allowed to turn round and make a totally different case. The *Eshen Chunder Singh* v. *Shamachurn Bhutto*. (1) upon the proof of execution required in cases against a purdah nashin. See *Geresh Chunder Lahoree* v. *Mussumat Bhuggobutty Debia* (2); *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan* (3); *Sudisht Lal* v. *Mussamat Sheobarat Koer* (4); *Mahomed Buksh Khan* v. *Hosseini Bibi*. (5)

Cozens-Hardy, Q.C., replied.

The judgment of their Lordships was delivered by

LORD DAVEY. In October, 1887, the present appellant was married to Mussamat Imami Begum. She was then about sixty years of age, and the appellant was some eixteen years younger. Mussamat Imami Begum had been twice previously married, and from one of her former husbands she had inherited a considerable fortune, and at the date of her marriage to the appellant was a woman of large wealth. On the other hand the appellant appears to have been a person of very small means.

Mussamat Imami Begum executed a power of attorney dated November 3, 1887, in favour of the appellant by which she empowered him to collect her rents and grant receipts, and exercise other large powers over her property.

A few days afterwards Mussamat Imami Begum executed a sale deed dated November 9, 1887, by which she declared that she had sold two villages to the appellant for Rs.30,000, and having received the sale consideration in full from the aforesaid vendee had put him in proprietary possession of the property sold like herself. Jamna Parshad, the special sub-registrar, in his report stated that he had attended at the house of Mussamat Imami Begum on November 11, 1887, and that the Mussamat heard word by word the contents of the sale deed, and admitted from behind a screen the execution and completion thereof, and admitted that she had already received gold mohurs worth

(1) (1866) 11 Moor's Ind. Ap. Ca. 7, 24.

(2) (1870) 13 Moore's Ind. Ap. Ca. 431.

(3) (1874) L. R. 1 Ind. Ap. 192, 206.

(4) (1881) L. R. 8 Ind. Ap. 39, 43.

(5) L. R. 15 Ind. Ap. 81.

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Rs.20,000, and the sub-registrar further reported that the appellant, the vendee, paid in his presence ten bags containing Rs.10,000 to the Mussamat, the vendor. Fifteen days afterwards she executed a power of attorney dated November 24, 1887, for the purpose of obtaining mutation of names, the execution of which was also verified by a commissioner.

Mussamat Imami Begum died in the month of January, 1888. and shortly afterwards the present respondent and her sister since deceased, alleging themselves to be the lawful sisters and co-heiresses of the Mussamat commenced this suit against the appellant. By their plaint the plaintiffs denied the marriage between the Mussamat, and the appellant, and alleged that he had taken exclusive possession of and appropriated wtthout any title the bulk of her movable and immovable property. As to the sale deed they alleged that the Mussamat had no knowledge of that deed they nor was it read out to her, nor could she have understood it as she was under the influence of liquor, and that in short the sale deed, being spurious, forged, and without consideration, was void. The prayer of the plaint was for possession of the villages (including the two in question), and other property as detailed, and that should the defendant prove the sale of the two villages to be genuine the sale consideration thereof instead of possession should be awarded to the plaintiffs against the defendant along with the movable property, and for possession of the Mussamat's movable property or payment of its value. The appellant by his statement of defence denied the title of the plaintiffs and relied on the sale deed.

The Subordinate Judge found that the respondent and her co-plaintiff were the legal heirs of Mussamat Imami Begum, and that a marriage had taken place between the appellant and the Mussamat. The first finding was varied by the High Court, who found that although the respondent and her co-plaintiff were daughters of the same mother as the Mussamat, they were illegitimate. The result of this was that the plaintiffs became entitled to one moiety only, and the defendant (the appellant) to the other moiety of the property, These findings as varied by the High Court are not now in dispute.

The 4th and 5th issues relating to the sale deed were as follows :—

"4. Did Mussamat Imami Begum execute the sale deed dated November 9, 1887, conveying certain villages to the defendant, and did she do so while she was in a sound state of mind or when she was not in her senses, but in a state of intoxication without understanding what she was doing, that is to say, whether the contents of the said documents were understood by her or she was not capable of understanding them ?

"5. What is the actual value of the property sold ? Was Rs.30,000 a fiction or the actual amount of the sale considera-tion ? Was the sum of Rs.10,000 alleged to have been paid in presence of the sub-registrar, the commissioner, actually paid, or was the transfer without consideration ?"

It is unnecessary to discuss at any length the evidence given on these issues, because the two Courts are in substantial agreement as to the effect of it—although they are not agreed as to the legal result or consequence. Both Courts were satisfied that the Mussamat was not intoxicated at the time of verifica-tion of the sale deed, and that she was a woman capable of managing her affairs and that she did in fact manage them, and that she undoubtedly executed by her own hand the sale deed and power of attorney for the purpose of mutation of names being effected ; and as to the consideration for the sale, that although the Mussamat acknowledged receipt of Rs.20,000, it was not in fact paid, and that the bags purporting to contain rupees were produced before the sub-regitrar ; but there was no actual evidence of their contents or where the rupees (if rupees there were) came from or afterwards went to, and in short that no part of the consideration was proved to have been paid by the appellant to the Mussamat.

On these findings of facts (in which their Lordships entirely agree) the Subordinate Judge held that the presumption was that out of affection the Mussamat gave the property to the appellant as a matter of favour, and through some policy called that gift a sale, and that instead of a deed of gift she executed a deed of sale in order to sustain the honour and respectability

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of the appellant, who belonged to an old respectable family of the town, to screen him from any exposure. The learned judges in the High Court dissented from this view, and their Lordships agree with them. There is no evidence of any intention to make a gift, and there is no suggestion in the pleadings that the villages had been given to the appellant, or that his wife intended to remit to him or release him from payment of any part of the purchase-money. The acknowledgment of the previous receipt of Rs. 20,000 would no doubt enable the vendor to transmit the property to a second purchaser as between whom and the vendor the latter would not be entitled to deny the payment of that portion of the purchase-money. But as between the vendor and vendee it had not the effect of discharging him.

But while their Lordships so far agree with the High Court, they do not altogether agree on the result, though probably the difference is more one of form than substance. The High Court seems to have thought that in the circumstances there was a presumption of undue influence on the part of the appellant, and that he ought to have shewn that the old lady had independent advice and thoroughly understood what she was doing, and accordingly the Court set aside the transaction altogether. Their Lordships doubt whether this was right or altogether consistent with the previous findings by the Court. There is no case of undue influence made by the plaintiffs in their plaint or raised in the issues on which the case was tried; and there is no evidence that Rs. 30,000 was an inadequate price, or that the sale was an improvident one if the price had been paid. From the findings on the evidence their Lordships think it must be presumed that the Mussamat intended to pass the property for some purpose, and as the suggestion of a gift is excluded the deed must operate (if at all) according to what it purports to be, namely, a sale. In coming to this conclusion in the case before them their Lordships do not intend to throw the slightest doubt on the sound doctrine laid down in numerous cases as to the obligations of persons taking benefits from a purdah nashin lady.

Their Lordships, therefore, will humbly advise Her Majesty

that relief be given to the surviving plaintiff (the present respondent) in accordance with the fourth paragraph of the prayer of the plaint, and for that purpose the decree of the High Court be varied by inserting after the words "specified below" the words "except the two villages, Jabida Chapri with the garden and houses, and Pachtaur in the Pargana of Nawabjang, but including the sum of Rs.15,000, being one moiety of the sum of Rs.30,000, the price of the said two villages payable by the defendant," and after the words "date of possession" the words" and together with interest on the said sum of Rs.15,000 from November 9, 1887, up to date of payment," at the rate usuallay allowed by the Court, and instead of the words "the amount whereof shall be" the words "the respective amounts of such mesne profits and interest to be," and that in all other respects the said decree ought to be affirmed and the appeal dismissed.

As the appellant came before their Lordships to claim the property as a gift without any payment, and never in the course of the proceedings offered to pay or give credit for the price as part of Mussamat Imami Begum's estate, their Lordships will not advise Her Majesty to make any alteration in the disposal of the costs by the High Court; and for the same reason, and because the respondent has substantially succeeded, they do not think that the variation made by them in the decree should relieve the appellant from the payment of the costs of these appeals, which the appellant must therefore pay.

Solicitors for appellant: *Ranken Ford, Ford & Chester.*

Solicitors for respondent: *Pyke & Parrott.*

J. C.* SAADATMAND KHAN . . . . . APPELLANT;

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AND

April 20; *May* 3. PHUL KUAR . . . . . RESPONDENT.

ON APPEAL FROM THE DISTRICT COURT OF FARRUKHABAD, NORTH WEST PROVINCES.

Practice—Sale in Execution—Material Irregularity—Act XIV. of 1882, *ss.*287, 311—*Misrepresentation of Value in Sale Proclamation.*

Held, that a material misrepresentation (though made gratuitously by the decree-holder and the Court) of the value of property contained in a proclamation of sale under s. 287 of the Civil Procedure Code is a material irregularity in publishing or conducting a sale in execution within the special remedy provided by s. 311 for setting such sale aside.

APPEAL from an order of the District Judge (Jan. 30, 1892 reversing an order of the Moonsiff of Kaimganj (July 13, 1891).

On May 16, 1891, the respondent filed, as against Chunni Lal the decree-holder, and the appellant as auction purchaser, her objections to the sale in execution in this case; the material one, as far as the decision of this appeal is concerned, being the false representation contained in the sale proclamation, the application for attachment, and the order of attachment, founded on the decree-holder's affidavit, to the effect that the value of the property was Rs.800 only, whereas its true value was Rs.10,000.

The appellant in his answer contended that "all persons could ascertain the value of the property from a perusal of the sale proclamation, in which the material points for ascertaining the price were entered."

Upon this point the Moonsiff, while overruling all other objections taken, observed:—

"It has also been urged that in the sale notice the value of the property was to be Rs.800, and it is contended that the would-be purchasers, and also the officers conducting the sale, were deceived by reason of this statement. In my opinion

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

this contention is untenable. No doubt that Rs.800 is mentioned in the sale notice as the value of the property, and that this sum is very inadequate. This value is put down in the column of remarks. In the notice of sale the amount of share and all the particulars required by s. 287 of the Civil Procedure Code are stated. The revenue assessed on the land is correctly stated therein. If the decree-holder did state the value to be Rs.800, this is no reason, in my opinion, to set aside the sale. So far as I know, neither the Code of Civil Procedure nor any rules require that the value of the property sought to be sold should be mentioned in the sale notification. The pleader for the objector has not pointed any rule requiring this. If Rs.800 was put down in the notice as value of the property, the entry was uncalled for; and inasmuch as the stating of the value in a notice of sale was not legally obligatory, the fact of the omission to state the value, or to give a wrong value, is no reason to set aside a sale."

The District Judge, on the other hand, said :—

"It is pointed out, in the next place, that the decree-holder in his affidavit put down the value of the property at Rs.800, i.e., about one-tenth of the real value, and that this was the value notified in the sale proclamation. This, I must hold, was a gross misrepresentation on the part of the decree-holder. The last clause of s. 245, Civil Procedure Code, provides that in the case of a decree for money, 'the value of the property attached shall, as nearly as may be, correspond with the amount for which the decree has been made.' I have found that Subordinate Courts appear to be under the impression that the inquiry prescribed by rule 6 (p. 9, Civil Rules and Orders) should be confined to finding out whether the property proposed to be sold is ancestral or not. But this is a mistake. The inquiry should be for the purpose of ascertaining the particulars specified in s. 287, Civil Procedure Code. Amongst the heads which, according to s. 287, should be specified in the sale proclamation 'as fairly and acccurately as possible' is 'every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property.' Had the inquiry held by the Moonsiff under

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rule 6 been worthy of the name, I think he could not fail to have been struck by the very peculiar circumstance that whilst the annual land revenue of the property was put down at Rs.543 10*a*. 6*p*., its estimated value was entered as only Rs.800. The utter absence of proportion between the amount of Government revenue and the estimated value entered in the sale proclamation would of itself be enough to deter intending purchasers, and induce them to think that there was something wrong with the title."

The appellant obtained a certificate to appeal to Her Majesty on evidence that the value of the property exceeded Rs.10,000, and on a ruling that the District Judge's order was equivalent to a final decree under ss. 588 and 594 of the Civil Procedure Code.

Saunders, for the appellant, contended that he was an innocent purchaser for value and that he was not responsible for the fraudulent misrepresentation of value contained in the decree-holder's affidavit, which was the basis on which the subsequent official representations were made. Neither was he responsible for the negligence of the officials in adopting and repeating that misrepresentation. Even if the statement of undervalue was an irrgularity in conducting the sale, there was no direct evidence that the property was by reason of that irregularity sold for an inadequate price, and therefore no evidence of resulting substantial injury as required by the Code. In the absence of this evidence the sale should not under the circumstances have been set aside.

Cowell, for the respondent, was not heard.

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May, 3.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The respondent is the proprietor of an estate in the mouzah of Zira Rahimpur in Farrukhabad. In April, 1890, one Pati Ram obtained a decree for the sum of Rs. 565 9*a*. against her and another as heirs of a recently deceased owner who was Pati Ram's debtor. This decree was transferred to Chunni Lal. On December 10 in the same year Chunni Lal applied for the attachment and sale of the property.

It was put up for sale on April 20, 1891, and was bought by the appellant for the sum of Rs.670. The property is valued at eight or nine thousand rupees.

In May, 1891, within the time allowed by law, the appellant filed a petition in the Court of the Moonisff of Kaimganj for the purpose of setting aside the sale under s. 311 of the Code. The Moonsiff held that, notwithstanding the inadequacy of price, there had been no irregularity within that section which justified him in setting the sale aside, and accordingly he dismissed the petition. On appeal the District Judge took a contrary view, and decreed that the sale should be set aside. That is the decree appealed from.

The respondent alleged several irregularities in the execution proceedings, as to the existence or the effect of which the two Courts took opposite views. Their Lordships do not think it necessary to mention more than one ground for impeaching the sale. It is indeed something more than the kind of irregularity which is commonly alleged, for it is a misstatement of the value of the property which is so glaring in amount that it can hardly have been made in good faith, and which, however it came to be made, was calculated to mislead possible bidders, and to prevent them from offering adequate prices, or from bidding at all.

Sect. 287 of the Code orders that the Court shall cause a proclamation of the intended sale to be made. The proclamation is to specify "as fairly and accurately as possible" several enumerated particulars; and, finally, "every other thing which the Court considers it material for the purchaser to know in order to judge of the nature and value of the property."

The proclamation in this case appears to have followed an affidavit of Chunni Lal, the decree-holder, in which he stated that the property is valued at about Rs. 800. It states, among other things, that the sale is for the recovery of Rs.652 3*a*. 9*p*. and interest, and that the particulars specified in the schedule are filled in to the best of the knowledge of the Court. The schedule contains several columns. One shews that the jama of the property is Rs.543 10*a*. Another is headed, according to the English translation, "Other particulars, whatever

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ascertained regarding the nature and value of the property," and it contains the figures Rs.800. This means that the value of the property to sell was estimated by the Court at Rs. 800.

The Moonsiff considered that this misrepresentation of value was not a material irregularity for which a sale could be set aside. His reason was that no rule required that the value of the property should be mentioned in the proclamation; and that as the entry was uncalled for and not legally obligatory, to give a wrong value is no reason for setting aside a sale.

This is a very mistaken view. It is true, as before observed, that the misstatement is something more grave than an ordinary irregularity of procedure, but the fact that it is so, and that it was made gratuitously by the decree-holder and the Court, does not prevent it from being "a material irregularity in publishing or conducting" the sale, such as to bring the case within the special remedy provided by s. 311. Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be considered as one of those things "which the Court considers material for the purchaser to know," and it is enacted in terms (though express enactment is hardly necessary for such an object) that those things shall be stated as fairly and accurately as possible. It must have been possible to state the value of this property with very much greater approach to fairness and accuracy than was done in the proclamation. The learned District Judge holds that there was a gross misrepresentation on the part of the decree-holder, and he intimates his opinion that the Court ought to have seen from the amount of the jama that the value could not be as stated. Certainly it seems that there must have been blamable carelessness on the part of whatever officer was responsible for the terms of the proclamation.

The learned District Juge points out two circumstances calculated to enhance the amount of injury done to the debtor by such a misstatement. One is, that s. 245 of the Code orders that the value of the property attached "shall, as nearly as may be, correspond with the amount for which the decree has been made"; so that an intending purchaser would readily accept the assurance of the Court that an estate attached for Rs. 565

was worth no more than Rs.800. Another is, that the disproportion between the jama and total value was calculated to excite suspicion of something wrong with the title, and so to deter biddings. Their Lordships have to express entire agreement with the learned District Judge, and they will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Solicitor for appellant : *H. Percy Becher.*

Solicitors for respondent : *Ranken Ford, Ford & Chester.*

BALKISHEN DAS AND OTHERS . . . . PLAINTIFFS ;

AND

SIMPSON . . . . . DEFENDANT.

J. C.*
1898
April 22 ;
May 14.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Act XI. of 1859, *ss.* 8, 33—*Sale where no Arrears due—Jurisdiction.*

Act XI. of 1859 does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of Government revenue.

In a suit against the purchaser to set aside a sale under Act XI. of 1859 of the appellants' village for arrears of revenue, it appeared that there were in fact no arrears, but that the collector had erroneously debited the appellants in excess of the revenue chargeable :—

Held, that (1.) there was no jurisdiction to sell ;

(2.) the suit was not excluded from the cognizance of the Civil Court under s. 33 by reason of the commissioner not having adjudicated on the objections to the sale ;

(3.) s. 8, which relates to the readjustment of the accounts of a defaulter, did not apply, since there had been no default.

APPEAL from a decree of the High Court (July 19, 1895) reversing a deeree of the Subordinate Judge of Tirhoot (Sept. 1, 1893).

The facts and proceedings are stated in the judgment of their Lordships.

* *Present* : LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

J. C.

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BALKISHEN DAS v. SIMPOSON.

The litigation related to an estate described in the collectorate books as the separate 5-annas share of the village of Shahzadpore Anderkilla, bearing in the books the Towzi number 3592, and recorded as belonging to Ranjiwan Sahu. The meaning of that description is that the estate No. 3592 was a five-sixteenths share of the village, and had been separated from the rest thereof and allotted a separate number for revenue purposes, so that it might not be liable to sale for arrears of revnue of any other part of the village.

The Subordinate Judge decreed the suit of the appellants and set aside the sale. He was of opinion that the issues as to non-compliance with the formalities required by the Act need not be gone into, as such neglect of formalities could only be inquired into when an appeal had been preferred to the commissioner within the time limited by s. 2 of Act VII. of 1868, Bengal Council. He based his jugment on the ground that there was in fact no arrear of revenue due in respect of the estate at the time the same was put up to sale, and that therefore no sale under Act XI. of 1859 could take place. That Act, he said, could only come into operation when there was an arrear of revenue, and could have no operation when admittedly there was no arrear. He relied on *Baijnath Sahu* v. *Lala Situl Pershad*. (1)

The High Court (Prinsep and Ghose JJ.), in stating the facts of the case, said: "in 1884 the orders of the Board of Revenue were received granting abatements on the estates as per list on the Record, one of these being Shahzadpore Anderkilla (proprietor Ramjiwan Sahu), Sudder Jumma, Rs. 89 8*a*. 7*p*., and the remission Rs.6 9*a*. 10*p*. In communicating the orders of the Board of Revenue to the particular department of his office known as Towzikhana, the collector issued a perwana, in which, unfortunately, the number of this particular property was altered and given as 10,313. We observe that this number 10,313 was the number giving to six other estates which preceded it on the list, and this probably accounts for the clerical error committed,"

(1) (1868) 2 Beng. L. R. F. B. 1; S. C. 10 Suth. W. R. F. B. 66.

They then considered certain other parts of the judgment of the Subordinate Judge, and proceeded as follows :—

"The Subordinate Judge, however, found that on taking an account and making allowance for the abatement granted, there was in the collector's hands a sum more than sufficient to cover the revenue due for 1891, and that therefore there was no arrear of revenue due for which a sale could take place under Act XI. of 1859. He accordingly gave the plaintiffs a decree declaring the sale null and void."

Upon the point whether the appellants were entitled to say that there was no arrear of Government revenue for which the estate could be sold, because the full amount was standing to their "credit, and should have been carried to account as against the amount due," they said : "If this had been a mere question of account in regard to this particular estate, we might have been inclined to hold that the order of the Subordinate Judge is correct. But we find that the abatement was distinctly entered as against another mehal, No. 10,313, of which the same Ramjiwan Sahu was stated to be the proprietor, and we have no information whether Ramjiwan Sahu has not received credit on account of this abatement for that estate. However that may be, the amount having been carried to the credit of this mehal, it could not be appropriated in regard to the other mehal, No. 3592, except by a transfer regularly applied for, and made within the terms of s. 8 of the Revenue Sale Law of 1859".

And they added : "The mistake may have been very unfortunate in its result as regards the proprietor of this property, and it may also be said to be due to carelessness on the part of the office of the collector. But the plaintiffs are debarred in the present suit from obtaining any readjustment of account by reason of s. 8 of the Revenue Sale Law of 1859, because in order to comply with that law it was necessary for them to have made an application before the revenue fell due, to have a transfer made to their credit of any amount to which they might be entitled by reason of the abatement of revenue ordered by Government, and which had not been properly carried to their credit in the collector's register."

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Branson, for the appellants, contended that the Subordinate Judge was right in holding that Act XI. of 1859 did not under the circumstances authorize a sale. The High Court ought to have held that the money standing to the credit of these appellants in the collectorate was in fact money paid on account of the revenue of this very estate, and was not money standing to the credit of any account which required an order of transfer before it could be applied as a payment of revenue due in respect of estate No. 3592. It was admitted that the appellant had paid the money on account of revenue due from estate No. 3592; it was admitted that the collector had got the money, and that it was enough to satisfy all existing demands for revenue. It was unreasonable to hold that there was arrear and consequent liability of the estate to sale simply because the collector had blundered in carrying the mony received for one estate to the credit of another estate. The suggestion made that Ramjiwan had derived some benefit from the transaction of carrying the money to the credit of the wrong estate was without any foundation in the evidence. Under the circumstances there was no jurisdiction under Act XI. of 1859 to sell. Reference was made to *Baijnath Sahu* v. *Lala Situl Pershad* (1); *Sreemunt Lall Ghose* v. *Shamasoonduree Dassee* (2); *Thakoor Churn Roy* v. *Collector of 24-Pergunnahs*. (3)

Phillips, for the respondent, submitted that the appeal could not proceed the Secretary of State not having been made a party to the appeal, although a party defendant in the suit. The respondent claimed in the Courts below that in case the sale were set aside, the Secretary of State should be ordered to refund to him his purchase-money with interest as provided by s. 35 of Act XI. of 1859. He also objected in the High Court to the Subordinate Judge's order that he jointly with the Secretary of State should pay the appellants' costs. If the sale is now set aside, he is entitled to the relief claimed in the High Court. The sale, it was contended, could not be set aside against the respondent unless also set aside against the Secretary of State. The effect of not making the Secretary a party

(1) 2 Beng. L. R. F. B. 1. (2) (1861) 12 Suth. W. R. 276.
(3) (1870) 13 Suth. W. R. 336.

to the appeal was that the decree upholding the sale was final against him. Further, it was contended that the suit would not lie. Under s. 33 of Act XI. and s. 2 of Act VII. of 1868 (Bengal) there ought to have been an appeal to the Commissioner. The sale was made for arrears which appeared in the collector's books with the appellants' acquiescence to be due. It ought to have been submitted to the commissioner whether any arrear was due, and whether the appellants were entitled to rely on the alleged reduction of revenue. Sect. 8 of Act XI. had not been complied with by the appellant. If the sale is set aside the respondent ought to have a refund of his purchase-money with interest under s. 35. The decree in favour of the Secretary of State, unappealed from, enured to the benefit of the respondent.

Counsel for the appellant were not heard in reply.

1898
May 14.

The judgment of their Lordships was delivered by

LORD WATSON. The appellants, plaintiffs in the present suit, were, until September 5, 1891, proprietors and in possession of a separate 5-annas share of the village of Shahzadpore Anderkilla, situate within the Collectorate of Mozufferpore.

Down to the year 1844, the jumma or annual revenue payable to the Government in respect of the said 5-annas share was Rs.89 8*a*. 7*p*. In the beginning of 1884, the Board of Revenue sanctioned a reduction of the revenue annually payable to the extent of Rs.6 9*a*. 10*p*., thus fixing the jumma for the future at Rs.82 14*a*. 9*p*. instead of Rs.89 8*a*. 7*p*.; and their decision to that effect was duly communicated to the Collector of Mozufferpore by a letter dated March 3, 1884. From that date until the year 1891 the owners for the time being of the 5-annas share continued to make yearly payments to the collector to account of the jumma.

It now appears, and it is not disputed, that in 1884 the collector, on receipt of the decision of the Board of Revenue, erroneously entered in his books the abatement of jumma which they had granted as applicable to another estate in which the owners of the 5-annas share of Shahzadpore Anderkilla had and have no interest. The mistake which was thus committed

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by the collector, or some of his staff, must have been due to their ignoring or disregarding the plain terms of the decision of the Board of Revenue which had been sent to them. It has been suggested in both Courts below that the error may have been induced by the fact that, in the letter which enclosed the decision of the board, there was a clerical error in giving the Towzi number of the 5-annas share in question; but that explanation, if it be correct, can afford no excuse for failure to give effect to the decision itself.

The result of the mistake was that, during a period of eight years, from 1884 to 1891, whilst the proprietors of the 5-annas share were duly credited in the books of the collector with the full amount of the payments annually made by them on account of revenue, they were wrongly debited in each year with Rs.89 8*a*. 7*p*., being the amount of the jumma before its reduction. In consequence of that error in the debit side of the account, the books of the collector shewed a balance as due by the appellants, in March, 1891, being the end of the revenue year 1890-91, in respect of the revenue payable for the preceding year; whereas if the annual jumma had been charged as its reduced rate, in terms of the order of the Board of Revenue, the books would have shewn a balance of Rs.44 15*a*. 3*p*. at their credit.

The collector then proceeded to sell the 5-annas share in question, as for arrears of jumma due by the appellants, in supposed compliance with the provisions of Act XI. of 1859. The property was sold by auction on September 5, 1891, when it was purchased by Charles F. R. Simpson, who is the sole respondent in this appeal.

The appellants thereafter presented an appeal against the sale to the Commissioner of Tirhoot, under s. 2 of Bengal Council Act VII. of 1868, which was rejected by the commissioner as being out of time. On July 27, 1892, they brought this suit before the Subordinate Judge of Tirhoot against the auction purchaser, the respondent in this appeal, and also against the Collector of Mozufferpore, as representing the Secretary of State for India, praying to have the sale set aside, and other relief. The defendants appeared and lodged written

statements, in both of which it was pleaded that the action was not cognizable by the Civil Court by reason of the plaintiffs having failed to appeal in due time, under the provisions of s. 2, Act VII. of 1868 (Bengal). The present respondent asserted that the suit was "based upon false allegations"; and the other defendant alleged that the plaintiffs had taken no steps to have the abatement taken into consideration, and had for several years continued to pay the original Government revenue. It has not been shown that there are any false allegations in the plaint, or that the plaintiffs, after the abatement was granted, continued to pay the old jumma. They made payments to account of revenue, which in the third of the eight years already mentioned was of the same amount as the old jumma, in three of them were in excess of it, and in four of them were below its amount. There is nothing to shew that any of these payments were made on account of the old jumma, with the exception of the erroneous entries in the collector's books, for which he alone was responsible. It was not within the right, and it certainly was not the duty of the appellants, to examine and check these entries.

The Subordinate Judge, on September 1, 1893, held that the suit was not excluded by the failure of the plaintiffs to present an appeal within due time, under s. 2, Act VII of 1868 (Bengal); that, in point of fact, there was no arrear of revenue due by the appellants at the time when their property was sold; and that the sale was illegal, and injurious to the appellants. He accordingly declared the sale to be inoperative, and decreed possession of the property sold to the plaintiffs, with costs.

The respondent in this appeal brought that judgment under the review of the High Court at Fort William, when two of the learned judges, Sir Henry Prinsep and Chunder Madhub Ghose JJ., reversed the decree of the Subordinate Judge and dismissed the appellants' suit, with costs to the present respondent in both Courts.

The following were the grounds assigned for their decision by the learned judges of the High Court. They held, in the first place, that, inasmuch as there had been no adjudication by the

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Commissioner upon the objections stated to the sale by the appellants, these objections were excluded from the cognizance of the Civil Courts by s. 33 of Act XI. of 1859. If that course were permitted, the learned judges observed that it would 'permit a defaulter in the payment of Government revenue, who desired to set aside a sale for irregularity with substantial injury resulting therefrom, practically to do so without any appeal to the commissioner at all." In the second place, they held that the appellants were debarred, in the present suit, from obtaining "any readjustment of account" by reason of s. 8 of the Revenue Sale Law of 1859, because, "in order to comply with that law, it was necessary for them to have a transfer made to their credit of any amount to which they might be entitled by reason of the abatement ordered by Government, and which had not been properly carried to their credit in the collector's register." They were accordingly of opinion that the appellants were without a remedy, although they indicated that the mistake was unfortunate, and may also be said to be due to carelessness on the part of the office of the collector. Their Lordships do not think that the decision of the learned judges can be maintained upon either of these points, which they will proceed to notice separately.

Sect. 3 of the Act XI. of 1859 provides that, in default of payment of revenue, within the time appointed for each district by the Board of Revenue, the "estates in arrear" in those districts "shall be sold at public auction to the highest bidder. The Act does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of Government revenue. The whole clauses of the Act of 1859, in so far as these relate to sales or to their challenge at the instance of the proprietor, as well as the provisions of s. 2 of Act VII of 1868 (Bengal), are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty. The enactments of 1859 and of 1868 are obviously intended to apply to cases in which, if the irregularity or illegality of the sale proceedings alleged by the objector be negatived, the sale will remain valid. But the chief and substantial objection upon which the appellants' plaint is based is

that, at the time when their 5-annas share of the village Shahzadpore Anderkilla was sold, there were no arrears of revenue due by them in respect of it. It does not appear to their Lordships to admit of dispute that the objection is founded in fact. In their opinion a stupid blunder made by the collector or his staff in his own books cannot deprive the appellants of their right to claim, and have effect given to, the permanent abatement which was allowed by the Board of Revenue in March, 1884. The result is that the whole proceedings of the collector, with a view to the sale of the 5-annas share, were beyond his jurisdiction, and are not entitled to the protection given him by the Act in cases where sale is authorized, although it may be attended with some irregularity or illegality. Their Lordships are accordingly of opinion that it was rightly held by the Subordinate Judge that he had jurisdiction to entertain the objection to the sale to which he gave effect, although the point had not been considered and disposed of by the commissioner.

The observations made by the learned judges in regard to the second point upon which their decision is rested do not appear to their Lordships to be strictly accurate either in fact or law. There is no question in this case about a transfer from the account kept by the collector for the mehal 10,313 to the credit of the account kept by him for the 5-annas share of Shahzadpore Anderkilla. The only error in the latter account consists, as already stated, in annually entering Rs. 89 8*a*. 7*p*. instead of Rs.82 14*a*. 9*p*. to the debit of the appellants. The payments made by the appellants are correctly credited. In that state of the facts, their Lordships are unable to conceive what possible application the provisions of s. 8 of Act XI. of 1859 can have to the present case. The clause contemplates two cases only. The appellants are not within the first of these, which relates to a defaulter to revenue who claims a remission or abatement which has not "been allowed by the authority of the Government." In the second case, it is enacted that the collector's possession of money belonging to the defaulter shall afford no answer to the default, unless the

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money stood in the defaulter's name alone and without dispute, or the collector has failed, after application by the defaulter, to impute his money towards payment of the revenue. The enactment has no application, except there be (1.) default in payment of the revenue, and (2.) possession by the collector of money of the defaulter not indisputably placed to his credit. But the appellants were not in default. All moneys paid by them have been correctly credited; and their alleged default, which is a pure fiction, is based upon erroneous debit entries to which they were not parties.

Although the Secretary of State for India had been represented in the Courts below by the Collector of Mozufferpore, the appellants did not join him as a party to the present appeal. Upon that ground the respondent pleaded in limine that the appeal taken to this Board was incompetent; and, at all events, that the hearing of the appeal ought to be delayed until the Secretary of State for India had been made a party to it. Their Lordships rejected the contention, which was maintained upon the mistaken view that a decree obtained by the appellants in this suit against the Secretary of State would constitute res judicata in any question or proceeding between that Minister and the respondent. In their opinion the position of the Indian Secretary, in cases like the present, is correctly explained by Mitter J. in *Bal Mokosud Lal* v. *Jirjudhan Roy*. (1)

The appellants, with the view of obviating the preliminary objection stated by the respondent, presented an incidental petition for an order making the Secretary of State for India a party to the appeal. The application was opposed by the Secretary of State, and was refused by this Board with costs. The respondent, notwithstanding, persisted in his preliminary objection at the hearing of the appeal.

Their Lordships will humbly advise Her Majesty to reverse the judgment of the High Court, to restore the decree of the Subordinate Judge of Tirhoot, and to order the respondent to pay to the appellants the costs incurred by them before the

(1) Ind. L. R. 9 Cal. 276.

High Court. The respondent must pay to the appellants their costs of this appeal, including their costs of the incidental petition already referred to.

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BALKISHEN DAS.
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Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondent : *Sanderson, Adkin & Lee.*

MUHAMMAD IMAM ALI KHAN . . . DEFENDANT ;

AND

SARDAR HUSAIN KHAN . . . . . PLAINTIFF.

J. C.*
1898
June 30 ;
July 1, 5, 26.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Oudh Estates Act, 1869—*Sunnud holding Talookdar—Evidence of Custom of Descent by Lineal Primogeniture—Award of Talookdars—Withdrawal of Voluntary Admission of Title.*

Although an award inter alias partes of the Committee of Talookdars made, approved, and filed under s. 33 of the Oudh Estates Act, 1869, was not binding on the parties to this suit, *held*, that the award and also a wajib-ul-arz relating to the talook in question were admissible in evidence as to family custom, and, under the circumstances, of substantial weight.

Accordingly *held*, on the evidence, that the talook had under the native government descended to B., the plaintiff's ancestor, by the custom of lineal primogeniture, and that his acceptance as kabuliatdar was not benami for the defendant :

Held, further, that the sunnud to B. in 1860, following the summary settlements made with him, the talook being entered in List 2, was in intention as well as in form a grant to him of the absolute ownership, in respect of which he must, under the Oudh Estates Act, recover in this ejectment suit unless the defendant could fasten a trust upon it :

Held, that there was no evidence of any representation by the plaintiff creating a trust or estoppel in the defendant's favour, nor any adverse possession by the defendant for the statutory period. Although the defendant and his deceased brother had obtained possession and management of the talook, and even mutation of names in their favour, yet there had been no transfer of title to them in the special mode required by Act I. of 1869.

An admission by the plaintiff of title in the defendant proved to

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* *Present* : LORD WATSON, LORD HOBHOUSE, and LORD DAVEY.

J. C.

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have no real existence and to have been gratuitous can be withdrawn at any time, in the absence of any obligation incurred to the contrary.

MUHAMMED IMAM ALI KHAN *v.* SARDAR HUSAIN KHAN.

APPEAL from a decision of the above Court (July 26, 1894) reversing a decree of the District Judge of Lucknow (July 7, 1891).

The suit was brought to obtain possession of the talookdari estates of Bhatwamau and Katori Khurd, and the appurtenances thereto, situated in the districts of Bara Banki and Sitapur respectively, together with the whole of the remaining property, movable and immovable, said to have been owned and left by one Badshah Husain Khan deceased, the brother of the respondent.

The First Court held that the plaintiff was not entitled to any of the reliefs claimed by him, and dismissed his suit.

The Appellate Court held that the plaintiff's title must prevail, and that he ought to be decreed possession of the immovable property claimed with mesne profits.

The facts are sufficiently stated in the judgment of their Lordships.

The conclusion of the judgment of the High Court was as follows :—

Summing up the main conclusions arrived at, the case seems to stand thus : The plaintiff is the statutory heir of Badshah Husain Khan, the last legal owner of the talook. The plaintiff has established that he caused the defendant's name to be entered in the malguzari register under undue influence. Defendant has not established that Badshah Husain Khan constituted himself a trustee for his uncles as joint owners, nor has he established that the plaintiff constituted himself a trustee for him. He has not established that the plaintiff transferred the talook to him, and his suit is therefore barred by limitation. The result, therefore, is that the plaintiff's title must prevail, and that he ought to be decreed possession of the talook and mesne profits as claimed.

Lawson Walton, Q.C., and *Ross*, for the appellant, contended that the High Court had erred both in law and in fact in holding that Badshah did not constitute himself a trustee

of the talook in suit for the defendant and Tajammal, the deceased brother of the defendant. The evidence shewed that Tajammal and the defendant had always exercised proprietary powers and acted as the real owners of the talook from the time they obtained possession of it. Their position and proprietary rights were shewn to have been always recognised by Badshah during his lifetime, and by the plaintiff afterwards. On the other hand, the plaintiff had failed to shew that either he or Badshah before him had ever exercised any proprietary right in the talook, or that either of them had obtained any effective or beneficial possession thereof. The mutation of names after the death of Badshah had been in favour of the defendant and his brother with the consent of the plaintiff, and this had not been shewn to have been effected by the use of undue influence over the plaintiff. Further, the evidence shewed that the estate was resettled after the confiscation with the family in consequence of the loyal services of the defendant and his brother. All the circumstances connected with the regrant, the reasons which led to it, in the selection of Badshah as grantee, and the relations subsisting both before and after the regrant between Badshah and his uncles in reference to the management and beneficial enjoyment of the estate—in particular, the mutation of names in the Revenue Records—shew that Badshah took as trustee for them. Reference made to *Thakurain Ramanund Koer* v. *Raghunath Koer* (1): *Thukrain Sookraj Kowar* v. *The Government of India* (2): *Thakoor Hardeo Bux* v. *Thakoor Jawahir Singh* (3).

Cohen, Q.C., and *C. W. Arathoon*, for the respondent, were not called on.

1898
July 26.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The subject of this suit is the talook with the estates of Bhatwamau and other property said to have belonged to Badshah Husain Khan. The case can be stated more briefly and clearly by inserting a pedigree which is not disputed.

(1) 1881) L. R. 9 Ind. Ap. 41.
(2) (1871) 14 Moore's Ind. Ap. Ca. 127.
(3) (1877) L. R. 4 Ind. Ap. 178; see also L. R. 6 Ind. Ap. 161.

IMAM ALI KHAN.

TWO WIVES.

1st wife.

ALI BUX
died in 1247 F (1839—40)

1 NABI BUX died 1858.
2 HADI HUSAIN Predeceased ALI BUX.
3 TAJAMMAL HUSAIN born 1823, died 8th June 1872.
4 KAZIM HUSAIN The defendant born in 1829, died 21st July 1892.

NABI BUX — TWO SONS.
- BADSHAH HUSAIN born about 1839, d. 21st Nov. 1878.
- SIRDAR HUSAIN The plaintiff respondent.

TAJAMMAL HUSAIN — TWO SONS.
- DILDAR HUSAIN
- SHAH HUSAIN

KAZIM HUSAIN — THREE SONS.
- MUHAMMAD IMAM ALI KHAN, eldest son. The present appellant.
- [Two other sons of KAZIM HUSAIN: (1) NAWAB and (2) WASIZ.]

2nd wife

FOUR SONS.

1 NIZAM ALI
2 TUFFAZAL HUSAIN
3 ALI HUSAIN
4 FUZL HUSAIN

ALI HUSAIN
1 ABBAS HUSAIN Claimant before the British Indian Association.
2 SADEK HUSAIN
3 SAJJAD HUSAIN

The plaintiff, now respondent, who sues for possession is shewn on the pedigree as the brother and heir of Badshah. The original defendant, Kazim Husain, whose eldest son is now the appellant, is shewn as the plaintiff's uncle. The talookdar is entered in List II. of the Oudh Estates Act, namely, as one whose estates according to the custom of the family on and before February 13, 1856, ordinarily devolved on a single heir. His title was either conferred or recognised by the Mahomedan government before the annexation. After that event both summary settlements were made with him, and the sunnud was granted to him. He remained legal owner until his death in 1878, when his legal title passed to the plaintiff. At that time Kazim was managing the estates and receiving the rents. The suit was commenced in March, 1889. It is not now contended that the defendant has had any such possession as creates a bar by time. So far the facts of the case are undisputed.

The defendant's case is that before the death of Ali Bux this estate, like many others, was suffering from the misrule and disorder which was the proximate cause of the annexation. Rents were unpaid, tenants absconded, cultivation ceased, and the government officers tried to extort revenue which was not earned by harsh measures against the persons of the proprietors. As regards this estate he says that after the death of Ali, Tajammal, then a youth, was seized and cast into prison; and Nabi, the heir, was frightened, and preferred seeking safety by deserting the estate, which the defendant describes as being "lost to the family." He adds that he and his brother Tajammal prevailed on the authorities to recognise Nabi's son Badshah, then about ten years old, and to take a kabuliat from him; but he alleges that the real benefit was given to Tajammal and himself, who became joint proprietors, Badshah being in effect a benamidar for them. As for the settlements, he contends that the first was the consequence of Badshah's position as kabuliatdar at the annexation, and that the second and the sunnud were arranged by Tajammal with the British officers, and that whatever legal interests were passed to Badshah were clothed with a trust for his two uncles. And he further contends that after the death of Badshah the plaintiff did acts by

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which the defendant's right of ownership was confirmed or fully recognised.

The questions thus raised are of a kind which is very familiar in Indian land litigation, and which happens to have come before their Lordships frequently during the last few months: questions of benami where there is undoubtedly an ostensible or paper title on one side, and on the other side an allegation of possession in accordance with a real title. As regards the time prior to annexation it is a pure benami case. Afterwards a different element comes in, because the Oudh Estates Act introduces a mode of tenure more nearly resembling the English principle of distinction between legal and equitable estates, and the defendant has to meet the difficulty that the plaintiff possesses a legal estate by the force of which he must recover unless a trust can be fastened on it. Still, the disputes are throughout strongly analogous to benami disputes, and both sides have adduced, as is usual, a great volume of evidence, including an amount of fiction and falsehood more than is usual even in controversies of this kind.

The District Judge who tried the cause believed the substance of the defendant's story, and dismissed the suit, but without costs. The Court of Appeal, consisting of the Judicial Commissioner and Additional Judicial Commissioner, reversed that judgment, and gave the plaintiff a decree for possession and mesne profits. Their Lordships have now to decide whether the Court of Appeal is right. They do not find it necessary to go into the numerous intricate discussions of subordinate points which have been elaborated with great care by the learned judges below. They have been much aided by the fulness and accuracy with which all the broader features of the case have been presented by the counsel for the appellant. At the close of Mr. Ross's able argument they had arrived at the conclusion that the apparent title and the real title coincide, and both belong to the plaintiff.

The history divides itself into three stages: that which comes before the annexation, that which extends from the annexation to the death of Badshah, and that which comes after the death of Badshah.

The first question is, What was the position of Badshah at the time of annexation? And it is perhaps the most important of the questions, because without understanding it rightly it is difficult to get a clear idea of the subsequent events. Is the position which Badshah obtained as kabuliatdar to be attributed to the fact that the talook descended according to the rule of primogeniture, so that, after Nabi, Badshah would be the heir of Ali Bux, or to the fact that Tajammal and Kazim themselves becoming beneficial owners chose him as their benamidar? The first step is to ascertain whether the rule of descent was that of primogeniture. That it descended by custom to a single heir is the common case of both parties. The District Judge is of opinion that it descended by primogeniture not lineal. The only alternative to lineal primogeniture is primogeniture by proximity of degree. But there is no evidence to prove such a mode of descent, and if there were it would not help the defendant's case. Among those who are equal in proximity the elder in line is to be preferred. During Nabi's life, therefore, he was heir by proximity, and if he were to be considered as dead his son Badshah would be heir to him. It has indeed been suggested in argument, mainly with an eye to the last part of the case, that the family could elect one of themselves to be sole owner; but, first, such a custom is not primogeniture; and, secondly, there is no evidence of it except that of the defendant himself and a statement made in mutation proceedings which will presently be examined. Independently, however, of the failure to shew an alternative, there is good evidence in favour of lineal primogeniture.

In the record is a judgment, signed by Sir Man Sing, of the Committee of Talookdars, who made many awards respecting the provisions to be made for relatives of talookdars which, by s. 33 of the Oudh Estates Act, became, when duly approved and filed, legal decrees. Abbas, who was first cousin of Nabi Tajammal and Kazim, sued Badshah for partition; and thereupon arose an inquiry what was the descendible character of the estate. The judgment bears date November 2, 1868, and on this point it was as follows:—

"Secondly.—The statements made at the time of the

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1898

MUHAMMAD IMAM ALI KHAN v. SARDAR HUSAIN KHAN.

summary settlements, and the conclusion arrived at by the settlement officers from inquiries made" (into the matter), "and the statements made by the witnesses before the Committee, tend to shew that the custom of succession by right of primogeniture did prevail in this family. After Imam Ali Khan his eldest son Ali Bakhsh Khan, after Ali Bakhsh Khan his eldest son Nabi Bakhsh Khan, and after Nabi Bakhsh Khan his eldest son Badshah Husain Khan respectively succeeded to the estate and remained as sole proprietors."

The final award was that Badshah should "remain in possession under the rule of primogeniture and the ancient custom," and that Abbas and other cadets of the family should have a specified amount of land for maintenance.

Besides these decisions, which seem to fall strictly within the province of the Committee, they addressed themselves to the question how it happened that the kabuliat, the summary settlements, and the sunnud were procured by or for Badshah. Leaving out Hindustani words, they express themselves thus :—

"Looking into the circumstances of the case, and from the information obtained from those acquainted with facts, it is found that Tajammal Husain Khan and others, brothers of Nabi Bakhsh Khan . . . . in spite of their having been themselves proprietors, ... and though it was on account of their loyal services that the estate was conferred and the sanad granted, out of their own free will, in order to keep their family usage intact, got the kabuliat made and the sanad granted in the name of Badshah Husain Khan. This is no secret, and the fact is known to ourselves as well as to all the officers. It was for this that Badshah Husain Khan was declared to be the owner at the summary settlement, and Tajammal Husain Khan reserved no part of the estate for himself, although he had power to do what he liked, and it was quite possible to do so."

It is not contended that any part of this award is binding on the parties in the present suit. But it cannot be doubted that a suit for partition in 1868, when Tajammal was at the head of affairs in this talook, was one in which he took an active, probably the most active, part, though Badshah was the

defendant on the record. In a question of family custom it is impossible to disregard the conclusions of gentlemen who discharged such functions as those of the Committee. Whether their statements as to the special incidents of the kabuliat and sunnud should be looked at is another question. But the defendant relies on the passage just quoted as shewing that Tajammal was master of the situation, and might have had the kabuliat and the sunnud made to him if he had pleased. The Committee have mixed up the two matters of kabuliat and sunnud together, though they fall under different considerations. But taking it in the defendant's favour that the Committee really knew the facts and that we ought to receive their account, how does it bear on matters prior to annexation? They say in effect that Tajammal "and others" might have got the kabuliat in their names, but that they deliberately preferred to get it in the name of Badshah "in order to keep their family usage intact." That opinion does not support the defendant's claim, but is fatal to it. If Tajammal or he and others had really, though secretly, become proprietors, the family usage would have been destroyed.

There is no explanation what is meant by "others," nor in what sense the Committee meant to style them as proprietors. There is no proof or probability that Tajammal got any concession from the King of Oudh in his own favour; nor any evidence to support Kazim's story that it was he and Tajammal who got the kabuliat for Badshah, because they thought that a young boy would not be so severely treated as Tajammal had been. Nabi was in the service of the king, and so remained till the annexation. It is a much simpler explanation of the facts to suppose that the substitution of his son for himself was by his own wish.

Another piece of evidence on this part of the case is the wajib-ul-arz of the village Deokalia, which is part of the Bhatwaman estate. This class of document is always admissible in evidence, being an official village record. Its weight may be very slight or may be considerable according to circumstances. This record was made in June, 1871, when Tajammal was still at the head of affairs in the talook, and was verified

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by Karamat Khan, who is described in it as the agent of Badshah under a power of attorney, but is proved to have been the servant of Tajammal and of the defendant. If any misstatement was made, it could hardly have been one to the prejudice of Tajammal and Kazim. The document appears to their Lordships to be of substantial weight on the question of descent, and it has been so treated by the Court of Appeal. The history of Deokalia is part of the history of the talook The wajib-ul-arz traces the descent of the talook to Ali Bux, and then proceeds :—

"After the death of Ali Bakhsh Khan, out of his sons the eldest son, Nabi Bakhsh Khan, became the owner of the estate ; and Hadi Hasan Khan, Tajammal Husain Khan, and Kazim Husain Khan lived in commensality with Nabi Bakhsh Khan. Nabi Bakhsh Khan in his own lifetime got the kabuliat of the estate executed in the name of his son Badshah Husain Khan, the present talookdar, under whom the following new villages have been added to the estate."

The defendant, while admitting that the history of the talook is correct, declares that the quoted passage is entirely false. But he has no ground for saying so except his own improbable and unverified story as to the mode in which the kabuliat was procured. The village record gives an intelligible explanation of the facts, which Kazim does not. Their Lordships hold it to be proved : first, that the talook was one which, according to the custom of the family, descended by lineal primogeniture ; and, secondly, that Kazim's story of the loss of the estate, its reacquisition by Tajammal and himself, and the introduction of Badshah as kabuliatdar, must be rejected. The evidence leads them to think it most probable that Badshah was introduced because his father Nadi was for some reason desirous of relinquishing his position as talookdar, and wished the next in lineal succession to be substituted for him.

The events after the annexation lend at first sight more colour to the defendant's claim. Up to the first summary settlement of 1856 we have no more evidence than before. The company's officers found Badshah, then a youth of about

seventeen years, in possession under the kabuliat, and for aught that appears they simply acted on the existing state of things. But then came the Mutiny and the confiscations, which upset all the settlements of 1856. Nabi joined the insurgents, and was killed in 1858. It may well be that when it came to be considered to whom the confiscated estates should be restored, difficulty was felt about reinstating the eldest son of Nabi. About this time Tajammal came upon the scene, and took part in getting back the estate. He, too, had joined the insurgents, but he had come over to the British side, and had made himself active and useful in restoring order. It is clear that he stood high in the opinion of Colonel Barrow, who was a valued and trusted officer of great weight in Oudh affairs. Tajammal was a man of strong character, and it is possible that his young nephew might not have succeeded in doing what he did. There is, however, no evidence or reason to believe that he could have got the estate for himself, as is intimated by the Talookdars' Committee. It must be remembered that the British Government made a great point of recognising old titles, and of restoring as many estates as they could with due regard for security. They felt that the position of the Oudh talookdars was a very peculiar and painful one; that the inducement to take up arms was in many cases very strong; and that when the political necessity of putting down armed revolt had been satisfied, it was both the most prudent course, and the most consistent with a fair consideration of the case, to reinstate those who would enter frankly into the new conditions. It is possible and probable that on this point Tajammal was useful in satisfying Colonel Barrow and other officers.

The documents which bear directly on the reinstatement of Badshah are three in number. The first is a rubkar of the Collector of Lucknow, dated January 9, 1859.

"Badshah Husain Khan, talookdar of Bhatwamau, pargana Fatehpur, appeared before me in camp to-day. By reason of shelter having been given to Munshi Abdul Hakim, Extra Assistant Commissioner, sanction is hereby given that the taluka be restored to Badshah Husain Khan as heretofore.

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According to the settlement of 1264 Fasli, in case the Special Commissioner of Oudh does not sanction the mustajari (farming lease). Therefore it is ordered that the tahsildar be ordered to settle the taluka with Badshah Husain Khan, according to the terms of the settlement of 1264 Fasli, and send the settlement file with kabuliat within two days for my signature, and the Sadar kanungo is to report, within one day, whether sanction for mustajari of the ilaka has been received from Major Barrow."

The second is a letter from Colonel Barrow, dated January 27, 1859. He writes :—

"This taluka is resettled with its old proprietor, Badshah Husain Khan. Our total assessment is rather above the old government jama."

And on October 11, 1860, the sunnud was issued.

It is clear that in intention as well as in form the grant of the estate was made to Badshah. Tajammal probably rendered efficient service in getting it. Of what Kazim did, if he did anything, we have no evidence. There is much to justify the opinion of the Talookdars' Committee that Tajammal was active in keeping the family custom intact ; but there is nothing to shew that others were concerned with him, or that he and others were ever proprietors except in the very restricted sense of having some share or interest in the estate for maintenance. We cannot suppose any ownership to have been conferred on him or Kazim unless we first suppose that the British Government lent itself to a benami grant or a secret trust : a thing which nobody has ventured to suggest.

It is certain that during his life Tajammal managed the affairs of the talook, and to a great extent disposed of its revenues. From his age, his character, and his services, he was naturally held in high honour by his nephews. Badshah appears to have been a weak, indolent, and self-indulgent man, who with a concubine was kept in the residence at Bhatwamau on a sufficiently liberal scale to make him comfortable, and who was satisfied with that position. The defendant, indeed, asserts that nearly the whole of the revenues were divided between himself and Tajammal, and that Badshah had

a small fixed allowance. But he produced no accounts to support his assertion; or, rather, he did worse: he did tender some accounts which, when the time for proof came, were withdrawn. We must infer either that he had no accounts relevant to the question, or that, having some, he found that they would not suit his case. It is true that Tajammal was the principal acting personage; he was frequently addressed as talookdar, and a great many instances are shewn in which he was treated as representing the estate. But all that is consistent with his being manager for Badshah, though his position as being eldest uncle and his character and services gave him exceptional predominance in the family and prominence in the eyes of the world. After his death it seems that Kazim enjoyed the same power and position, at least to a great extent.

Great reliance is placed by the defendant on two powers of attorney executed by Badshah in the years 1871 and 1873. The earlier of these was given to Tajammal, and it is a singular document. It commences with a recital :—

"Whereas the reins of management of the estate affairs, such as domestic affairs, administration of the ilaka, and the conduct of business appertaining thereto, in the Courts detailed below, have always been in the hands and under the control of my respected and virtuous uncle, Raja Muhammad Tajammal Husain Khan Bahadur, who in every way is master of me and the estate in place of my father, but, whereas by reason of the number (engagement for payment of the revenue) of the estate, and the sanad being in my name, the said venerable has frequently to encounter difficulties in formal compliance with orders and conduct of cases relating to the estate, the necessity for executing the (mukhtarnama) general power of attorney has presented itself."

Badshah then covenants that "my respected uncle shall have full proprietary powers like myself" and he personally binds himself to maintain his uncle in the engagement of all the powers specified in five following paragraphs. As to the first paragraph, there is doubt about the translation which the Court below has thought of importance, and their Lordships

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do not comment on it. The 2nd, 3rd, and 5th are ordinary powers. The 4th runs as follows :—

"(4.) That like myself, the declarant personally, he has absolute powers of making transfers by mortgage or sale, &c., of the whole or any part of my movable or immovable property, and of executing documents of every description, gift, bakshishnama, grant of cash or land, tamliknama (deed of settlement) and will; and to have them duly registered."

The later power was given to Kazim after the death of Tajammal. It is nearly the same with the earlier one, the only substantial difference being that the 4th paragraph asserts not only that Kazim enjoys, but that he has heretofore enjoyed, the powers therein mentioned.

These deeds, as is contended and as the District Judge decided, confer the fullest proprietary powers, and are a complete admission of the benami title. To their Lordships it seems that, though obviously framed in the interest of Tajammal and of the defendant, they do not prove his case. If his story is true, Tajammal and himself were in the year 1871 actually in proprietary enjoyment. Why were such powers necessary? The reason given is that the settlement and sunnud were in Badshah's name. But that according to the defendant was all a sham well known to the principals, and not imposing on the rest of the world. In the ordinary case of benami the holding of a settlement or transfer by the benamidar would not interfere with the real owner's enjoyment. If the sunnud did so, why not throw off the temporary mask and claim the full ownership? Why be at the pains of framing a circuitous and inconsistent document such as that of 1871? It professes to be a power of attorney, and yet has its permanence secured by covenant. It states that Tajammal had the reins of government in various specified departments, whereas the claim now is that the recital recognizes, and that the 4th paragraph confers, full beneficial ownership. It states that Tajammal is "master of me and the estate in place of my father"; whereas the defendant's story is that Nabi never was owner and had nothing to do with Badshah's ownership. It purports at the outset to give full proprietary powers to Tajam-

mal "like myself," and does the same thing in paragraph 4, so that he has only the powers which Badshah also has. If it was really intended to be an admission of full ownership, or to confer full ownership under the guise of a power of attorney, it is a very insidious document, and such as would require satisfactory explanation before it could be permitted to operate as between uncle and nephew situated as Tajammal and Badshah were. Treating it as a power of attorney, it goes to shew ownership not in Tajammal, but in Badshah.

Another remark to be made on these powers is that they do not support, but tend to destroy the defendant's theory of joint ownership. In the deed of 1871 Tajammal is treated as absolute owner, not as joint with Kazim. In that of 1873 Kazim is treated as absolute owner. How did he become so, seeing that Tajammal left sons? Nay, not only is he credited with having absolute powers, but with having "heretofore enjoyed" them. How is that reconciled with the enjoyment of absolute powers by Tajammal alone within a few months before? The phenomena are inexplicable on the theory of proprietorship in Tajammal and Kazim. But they are clear enough if we suppose the two uncles to have been managers in exceptional honour and moral authority: "with the reins of management of the estate affairs in their hands"; and that is what their Lordships conclude to be the true state of the case.

After the death of Badshah it seems that the mutual relations which subsisted between him and the defendant were continued for a while as between the plaintiff and the defendant; for how long, or when dissension began, it is not material to inquire. What is material is to see if the plaintiff's dealings with the estate after it vested in him have precluded him from making his present claim.

Badshah died on November 21, 1878. Four days afterwards the plaintiff and his cousin Dildar, the eldest son of Tajammal, presented an application for mutation of names. They stated as follows:—

"After compliments we beg to submit that Badshah Husain Khan, talookdar of the Bhatwamau estate, breathed his last

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on November 21, 1878, and that according to the usage and custom of gaddi-nashini prevailing in our family, we, the heirs of the deceased talookdar, have unanimously with our own consent appointed Muhammad Kazim Husain Khan, son of Ali Bakhsh Khan, our own uncle, the head of our family, our patron and protector, who is qualified in every way as a gaddi-nashin in place of the deceased."

And they prayed for mutation to Kazim.

In addition to this application the plaintiff on February 26, 1879, filed a written statement which after reference to the application proceeded thus :—

"Even now, without coercion and reluctance, and of my own free will and accord, I do affirm the application and give my cordial assent to the same being granted for these reasons, namely, first, such a conduct on my part is the natural consequence of the cordiality, confidence, and mutual love and affection prevailing in our family, and similarly it was due to the cordiality existing between my father and my uncles, that those persons, though themselves real owners of the estate, caused the Lambardari of their ancestral and self-acquired estate to be recorded in the name of my deceased brother Badshah Husain Khan, and secondly, on account of the same love and amity my said uncle was so thick and thin with my late brother, as if the two had only one soul for two bodies; and my deceased brother ratified and admitted for ever the absolute proprietary powers exercised, and formal proceedings taken by the said uncle under the power of attorney dated April 30, 1873, executed in favour of my said uncle, which I may call a will, under these circumstances the late Badshah Husain Khan shall, as it were be alive during the lifetime of the said uncle. The affection and amity of feelings prevailing between my late brother Badshah Husain Khan and my said uncle were only equalled by the kindness shewn me by the said uncle. I too cherish the same feelings of obedience and love to my said uncle, as it was my duty to cherish to the said two souls during the lifetime of my late brother. Therefore, in my said uncle I recognize a living representation of my late brother in flesh and blood. I make this request with all

pleasure, and pray that the Government may accede to it, and the name of my said uncle may be recorded in the Lambardari register. Because of his kindness I am quite certain of may becoming a proprietor on his demise. Being thus confident, why should I make any other application (than the one I make) against the time-honoured customs ?"

Upon these representations mutation was effected in favour of Kazim.

These proceedings seem to have caused great difficulty in the Courts below. Apparently in both Courts it was considered that unless the plaintiff could displace his statements by shewing his ignorance of their being made, or that he was pressed into making them by the defendant, his case would be defeated, or at least seriously damaged. Indeed, the District Judge thought that the plaintiff must procure formal cancellation of the mutation before he could maintain the suit. Accordingly, those questions have been elaborately tried and argued. In order to shew first his ignorance, and secondly, pressure by the defendant, the plaintiff has told stories which both Courts have found to be entirely false. The Court of Appeal thought that undue influence might be properly inferred from the relative positions of the uncle and nephew, from the highly suspicious character of the application and statement, and from the false reasons assigned for mutation, especially the false statement of the family custom.

Their Lordships do not enter into this discussion. They do not see how the proceedings bar the right ef the plaintiff to assert his legal title. Supposing that in 1873 he believed them to be true and made them spontaneously, why should he not assert the true state of the case after he has learned it ? An Oudh talook cannot be transferred like an ordinary estate under Mahomedan or Hindoo law, because the Oudh Estates Act requires special modes of transfer. It is not now contended that the mutation operated as a transfer. It would be absurd to suppose that the plaintiff made any misrepresentation to the defendant ; neither was the situation of the defendant altered in any way to his prejudice. No consideration was given by the defendant, nor is there anything in the

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transaction to create a trust. Possibly it might have given the defendant a possession on which time would run; but if so, time has not run long enough to create a bar. Mr. Ross, who pressed this part of his case very earnestly though with great fairness, rested mainly, as their Lordships understood, on the admission of title made by the plaintiff; but a gratuitous admission may be withdrawn unless there is some obligation not to withdraw it; and there is not here any title on which such an admission can rest. If, then, there is no transfer, no estoppel, no bar by time, no trust, why should not the plaintiff assert his legal rights, whatever he may, in ignorance of the facts or in deference to his uncle, or for any other cause not injurious to the defendant, have admitted? Their Lordships hold that he can assert them; and they will humbly advise Her Majesty to affirm the decree of the Court of Judicial Commissioner, and to dismiss the appeal. The appellant must pay the costs.

Solicitors for appellant: *J. F. Watkins.*

Solicitors for respondents: *Young, Jackson, Beard & King.*

RAMESWAR KOER AND ANOTHER . . . DEFENDANTS;

AND

SYED NAWAB MEHDI HOSSEIN KHAN AND OTHERS . . . . . PLAINTIFFS.

J. C.* 1898 June 22, 23; July 8.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Indian Contract Act, 1872—*Transfer of Property Act*, 1882, Ss. 86 *and* 88—*Civil Procedure Code*, *s.* 209—*Appropriation of Payment by Creditor*—*Discretion of Court as to Contract Rate of Interest.*

Under the Indian Contract Act, 1872, as well as under ordinary rules of law, when neither the debtor nor any circumstances indicate to which of several debts a payment is to be applied, the creditor may apply it at his discretion to any debt actually due and payable to him from the debtor :—

Held, that neither under the Transfer of Property Act, ss. 86 and 88, nor in the absence of special circumstances under s. 209 of the Civil Procedure Code, can the Courts cut down the mortgage rate of interest by their decree.

APPEAL from a decree of the High Court (April 24, 1894) affirming a decree of the Subordinate Judge of Patna (Sept. 12, 1192).

The facts are stated in the judgment of their Lordships.

C. W. Arathoon, for the appellants, contended that, having regard to the terms of the various bonds and the conduct of the mortgagee, compound interest should not have been awarded to him. [He referred to Transfer of Property Act, ss. 2 and 67; Civil Procedure Code, s. 209; *Mangniram Marwari* v. *Dhowlal Roy* (1); *Surya Narain Singh* v. *Jogendranarain Roy Cowdhry*. (2)]

Sir W. Rattigan, *Q.C.*, and *Phillips*, for the respondents,

* *Present* : LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

(1) (1886) Ind. L. R. 12 Calc. 569. (2) (1892) Ind. L.R. 20 Calc. 360.

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contended that there was no substantial point of law raised, and that the respondents' claim had been satisfactorily proved.

Arathoon replied.

1898. July 8. The judgment of their Lordships was delivered by

LORD HOBHOUSE. The suit in which this appeal is presented is one for the enforcement of a simple mortgage. The Subordinate Judge passed a decree in favour of the plaintiffs for the sum of Rs.124,239 8*a*. and interest at 4 per cent. per annum from the date of the suit to date of realization ; with directions for sale in case of non-payment in six months. Both parties appealed to the High Court on several grounds ; when the High Court varied the decree by ordering 12 per cent. interest instead of 4, and with that exception affirmed it. The defendant apppeals from the High Court decree on grounds of which only two need be considered.

The mortgage bond in question is dated August 9, 1880. The principal money secured is a lac of rupees to be paid in five years. Interest is to be paid at the rate of R.1 per cent. per mensem, by three equal instalments in the year, each for four months' interest. In default of those payments of interest, the bond provides that the unpaid interest shall be added to capital and bear interest in its turn.

By their plaint the mortgagees claimed Rs.49,500 interest and Rs.10,728 compound interest. The sum allowed by the Subordinate Judge is considerably less ; but the defendant contends that it ought to be less still, because the mortgagees have appropriated to another bond called the Gya bond, which carries simple interest, divers payments which they should have appropriated to the bond now in suit, which carries interest on interest.

The Gya bond is dated March 26, 1881, and is made payable six months later. The Indian Contract Act, 1872, follows the ordinary rules of law in providing that when the debtor has ommitted to intimate, and when there are no circumstances indicating, to which of several debts a payment is to be applied, the creditor may apply it at his discretion to any debt actually

due and payable to him from the debtor. In this case the mortgagor did omit to intimate any intention on the point. Mr. Arathoon contends that there are circumstances indicating that his payments should be applied to the bond in suit. But the only circumstance he can point to is the original reluctance of the mortgagor to pay any compound interest at all. That reluctance was overcome, and it has nothing whatever to do with the appropriation of payments. It is clear that the mortgagees had a right, in the silence of the debtor, to apply to the Gya bond payments made after September 26, 1881, when that bond had fallen due.

One sum, however, Rs.1,734 12*a*. in amount, is indorsed on the Gya bond as having been paid on a day before the bond fell due. It is a very small matter, because it is only the interest on that sum which is in question. As regards the principal, it cannot signify to the mortgagors whether it went in payment of one bond or the other. Still, if there were clearly an error it might now be rectified. But it is certain that the specific point was never raised in the Courts below. In her written statement the defendant, who represents the original mortgagor, complains that the mortgagees have wrongly made credits to the interest due on other bonds, not that anything had been credited to interest not due. Both in that statement and in her grounds of appeal to the High Court the ground taken by her is that every one of the payments made should have been credited to the bond in suit, not that the earliest payment was distinguishable from the others. The case has been argued in both Courts on grounds applying equally to all the payments, and the defendant's arguments have been rightly rejected. If the point now made had been made in the Courts below, some answer or explanation might have been forthcoming. Their Lordships are not in a position to deal with it now.

The second ground taken for the appeal is that the High Court have altered the rate of interest after the date of suit from 4 to 12 per cent. The Subordinate Judge evidently considered that the case fell within s. 209 of the Civil Procedure Code, which gives a discretion to the Court in such matters. The High Court founded their order on ss. 86 and 88 of the

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Transfer of Property Act, which indicate clearly enough that the ordinary decree in a suit of this kind should direct accounts allowing the rate of interest provided by the mortgage up to the date of realization. It is pointed out by Mr. Arathoon that though the suit was instituted after the passing of the Transfer Act, the legal relations of debtor and creditor had arisen before it. Whether that would prevent the application of the Act is disputed, but assuming in the defendant's favour that it would, the same result must ensue in this case. The discretion given by the Code is a judicial discretion to be exercised on proper judicial grounds. The Legislature has stated what should be the rule in suits of this kind, and the Courts cannot have a better guide to their discretion. No peculiarity has been shewn to exist in this case for cutting down the mortgage rate of interest. If the High Court has allowed something less, the mortgagee makes no complaint. The mortgagor cannot complain if he is made to pay no more than he contracted to pay.

The appeal, therefore, fails on both the assigned grounds. Their Lordships will humbly advice Her Majesty to dismiss it, and the appellants must pay the costs.

Solicitors for appellants : *Dallimore & Son.*
Solicitors for respondents : *T. L. Wilson & Co.*

SHAM SUNDER LAL AND OTHERS . . . PLAINTIFFS; J. C.*
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AND
ACHHAN KUNWAR AND ANOTHER . . . DEFENDANTS. *June* 23; *July* 27.

OF APPEAL EROM THE HIGH COURT AT ALLAHABAD.

Hindu Widow—Powers of Alienation—Ancestral Family Business—Powers of Manager—Justifying Necessity.

Held, that the restrictions on a Hindu widow's powers of alienation are not relaxed in reference to an ancestral family business which has devolved upon her, and that a manager thereof appointed by her has no larger power of pledging the ancestral assets than his principal.

In all such cases the authority of the manager to pledge ancestral estate without the consent of the parties interested depends on proof that alienation is necessary to pay the debts of the business; and the onus of proof rests on the party who seeks to enforce his security.

APPEAL from a decree of the High Court (Jan. 15, 1898) reversing a decree of the Subordinate Judge of Bareilly (June 9, 1892) and dismissing the appellants' suit with costs.

The facts are stated in the judgment of their Lordships.

The Subordinate Judge found that Rajah Lalji was authorized by a mookhtarnamah executed in March, 1877, by the respondents and Rani Hulas Kuar to contract debts and execute mortgages; that he accordingly executed the mortgage bond of December 2, 1877, which was afterwards admitted by the respondents in the bond of 1881. Although the respondents had no disposing power over the estate during the lifetime of Hulas Kuar, they were estopped from resisting the appellants' claim by reason of their joining in her mortgage. He held that the consideration for the bond of 1877 was proved. He held that, as regards the respondent Enayet Singh, no case of undue influence was made out, and no evidence that he did not understand the contends of the document which he signed; and as regards Achhan Kunwar, she had the assistance of three men, her son, her mookhtar, and her

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husband, and that she understood the transaction and sealed it with her free will and consent.

After the Subordinate Judge's decision the case of Lala Amarnath Saha against the same respondents as above mentioned was decided (1), relating to a mortgage bond executed by Lalji in 1873, who, prior to the mookhtarnamah of 1877, acted under a power of attorney from Hulas Kuar alone. No case of justifying necessity or of bona fide inquiries was made out, and it was held that the mookhtarnamah of 1877 did not ratify the mortgage of 1873, since it had not been explained to the executants as being retrospective in its effect. The High Court in appeal in this case referred to this decision, and held that Rani Acchan Kunwar understood when she signed the mookhtarnamah of 1877 that "she was executing a document which empowered her husband Lalji to act as the attorney and agent of the family in the management of the villages, as, for instance, in granting leases, fixing and collecting rents, and giving receipts, and the payment of Government revenue, and such other matters"; that "there was no more reason to assume that the two purdah nashin ladies and Kuar Inayat Singh understood that the mookhtarnamah purported to empower Lalji to mortgage and sell their family property in the future, than there was for assuming that they understood that the mookhtarnamah purported to ratify and make valid mortgages and sales by Rajah Lalji of their family property in the past." Its scope and effect were not explained to any one of the three persons who executed it, and neither of the respondents was bound by its execution. Further, "we find that it is not proved that there was any necessity for the bond of December 2, 1877, or that those who advanced the Rs.10,000 made any inquiry as to the necessity for the loan."

With regard to the bond of 1881, the High Court found that it was not shewn that the respondents received any consideration therefor, or that the bond or any of the items in it was ever explained to Rani Acchan Kunwar, that Kuar Inayet Singh blindly executed the bond at the bidding of his father, Rajah Lalji, and that, even if it be assumed that he understood

(1) (1892) L. R. 19 Ind. Ap. 196.

its scope and effect, "that fact would not, in our opinion, entitle the plaintiffs to the relief claimed by them."

Cozens-Hardy, Q.C., and *Cowell*, for the appellants, contended that the judgment of the High Court, so far as it was based upon the absence of necessity, was not justified by the pleadings and evidence. No issue had been raised on that point. In the absence of that issue it had been ruled by the Subordinate Judge that the respondents had a right to begin, and their pleader had orally stated that his defence was the undue influence of Lalji—the impossibility of disobeying his orders. There was sufficient evidence of the execution of the documents and of the executants understanding the contents. The respondents could not have believed that by the mookhtarnamah of 1877 they were authorizing mere management of the estate, for their authority was not necessary for that purpose; Hulas Kuar's authority being alone sufficient. It was contended also that Lalji had implied authority as manager of an ancestral business to pledge the estate. The concurrence of the other members of the family was taken ex majore cautela. When an ancestral business is continued after the death of the ancestor, third parties cannot be expected to inquire into the condition of the family and the vesting of heritable rights. The manager of a family trade has the rights of the manager of an ordinary partnership, and must be taken, as regards third parties, to have all the powers necessary for the carrying on of the business. Reference was made to *Ram Lal Thakursidas* v. *Lachmi Chand Muniram* (1): *Johurra Bibi* v. *Sreegopal Misser* (2); *Joykisto Cowar* v. *Nittyanund* (3): *Bemola Dossee* v. *Mohun Dossee* (4); *Doulat Ram* v. *Mehr Chand* (5); *Samal Bhai Nathu Bhai* v. *Someshvar Mangal*. (6)

Mayne, for the respondent Achhan Kunwar, who alone appeared, contended that there was no proof of execution of these documents in a manner which was binding on purdah

(1) (1863) 1 Bomb. H. C. R. App. li.: see lxxi.
(2) 1876) Ind. L. R. 1 Calc. 470.
(3) (1878) Ind. L. R. 3 Calc. 738.
(4) (1880) Ind. L. R. 5 Calc. 792, 805.
(5) (1887) L. R. 14 Ind. Ap. 187.
(6) (1880) Ind. L. R. 5 Bomb. 38.

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nashins or upon Enayet Singh. There was no evidence that the contents of the documents had ever been explained or understood. He relied on *Lala Amarnath Sah* v. *Achan Kuar*. (1) The onus was on the appellants, whatever the pleadings and issues, to prove necessity; and in this case the pleadings and issues were sufficient for the purpose, and could not be relied upon as shewing that the necessity was admitted. Nothing was recoverable under the deeds, for the executants were not bound thereby in any respect. As regards the manager of an ancestral business having any authority in excess of his principal, derivable from the law of partnership, the cases cited did not bear out that contention. Lalji's authority to mortgage ancestral estates could only be based on proof of necessity, and admittedly no evidence of necessity had been given. Consequently neither the principal nor the agent had any power to bind by their alienation or dealings any portion of the estate which had belonged to Khairati.

Cozens-Hardy, Q.C., replied.

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July 27.

The judgment of their Lordships was delivered by

LORD DAVEY. On June 2, 1890, the present appellants brought their suit in the Court of the Subordinate Judge of Bareilly against the present respondents for Rs.52,858 8*a.* 6*p.*, on account of a bond dated December 2, 1877, and Rs.53, 485 4*a.* 6*p.*, on account of a subsequent bond dated April 1, 1881, in all Rs.86,338 13*a.*, and to enforce payment by sale of the property purporting to be hypothecated by the two bonds. The First Court found that the personal remedy upon the bonds was barred by limitation, but that the bonds were effectual against the property. The High Court held that the property was not bound, and dismissed the suit.

The property sought to be sold for payment of the bond debts was formerly the estate of Rajah Khairati Lal, who died in 1866. He seems to have carried on during his lifetime a business of money-lender and dealer in hundis. He left no sons, and his widow, Rani Hulas Kuar, on his death succeeded to a widow's estate in his property. He left one daughter, the

(1) L. R. 19 Ind. Ap. 196.

respondent Mussamat Achhan Kunwar, who was married to Rajah Lalji, and had two sons, Enayet Singh, the other respondent, and Shumster, who died some time after April 1, 1881, the date of the second bond. Hulas Kuar died on January 22, 1878, and Lalji died about 1888. Lalji during his lifetime seems to have managed the property for Hulas Kuar, and after her death for his wife Achhan Kunwar, who on the death of her mother succeeded to her father's property for a daughter's estate. Enayet Singh, though named as a respondent, did not appear on this appeal.

On March 5, 1877, Hulas Kuar and the two respondents executed a mookhtarnamah of that date, whereby they purported to appoint Lalji as the mookhtar-am, and to empower him on their behalf (amongst other things) to borrow money and execute documents, or hypothecate, mortgage, sell, or otherwise transfer movable and immovable property.

The bond of December 2, 1877, purports to be made by Rajah Lalji, son-in-law, Hulas Kuar, wife, and Achhan Kunwar, daughter, and Enayet Singh, grandson, and heirs of Rajah Khairati Lal, and contains an hypothecation of certain property formerly of Khairati Lal, and described as "in our possession and enjoyment as proprietors," for Rs.10,000, of which Rs.7683 3*a*. is deducted on account of debts previously due to the creditors, and Rs.2311 13*a*. is said to be paid in cash. It is signed by Lalji alone, and it is at least doubtful whether such an execution would be a valid exercise of the power of attorney, but the counsel for Achhan Kunwar declined very properly to insist upon this point.

The second bond of April 1, 1881, purports to be made by the same parties other than Hulas Kuar (who was then dead) under the same description as in the previous bond. It commences with a declaration that Rs.20,000 have been found payable by them to the creditors on account of prior debt and interest on two bonds for Rs.30,000, as detailed below, in addition to the principal amount of the two bonds aforesaid, and contains a statement that "the creditors have no deed of any sort other than the bond dated May 25, 1877, and the bond dated December 2, 1877, which are payable, and this bond."

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The zemindari property hypothecated is admittedly part of the estate of Khairati Lal. The mortgagors profess to bind "all rights which we possess or may possess in future." The Rs.20,000 acknowledged to be owing is thus made up :—

	R.	A.	P.
Interest on two bonds less previous payments	8,100	0	0
In respect of the rukka dated December 1, 1880 :—			
Principal	10,475	0	0
In respect of the interest on the amount of the rukka	1,300	14	0
In cash	124	2	0
	20,000	0	0

And in a note to the record the sum of Rs.10,475 is explained to be made up as follows :—

	R.	A.	P.
On June 22, 1879, for revenue . . .	2000	0	0
On November 5, 1879, to pay interest to Intzam Begam	1575	0	0
On May 17, 1880, to defray expenses of daughter's marriage.	2000	0	0
On August 2, 1880, to pay interest to Moti Ram Sah	4000	0	0
On October 9, 1880, to pay interest to Intzam Begam	900	0	0

This bond is executed by Rajah Lalji by the affixing of the seal of Achhan Kunwar, and by Enayet Singh, then of age. It should be mentioned that by a previous power of attorney, dated August 1, 1878, Enayet Singh, Achhan Kunwar, and Lalji in his own right, and as father and guardian of Kunwar Shumster Bahadur, appointed Lala Shanker Sahai their general attorney and agent, with power (amongst other things) to have documents executed by them registered. The bond of 1881 was registered on the admission by this person of the execution, completion, and receipt of Rs.124 2*a*. in cash on behalf of the executants.

What was the position of the parties at the respective dates of the execution of these two bonds? At the date of the bond of 1877 Hulas Kuar, as the heir of Khairati Lal, was the owner of his estate, but with a restricted power of alienation. Achhan Kunwar was next in succession, and would, if she survived her mother, become her father's heir, and take the estate subject to the same restriction. Enayet Singh was one of the two male heirs next in succession to the restricted estates who would be full owners in the event of their surviving their grandmother and mother. Enayet was, moreover, a minor. At the date of the bond of 1881 Achhan Kunwar was owner of the property for a daughter's estate with restricted power of alienation, and Enayet Singh was one of the heirs apparent. At both dates Enayet Singh was living in his father's house and dependent upon him. In 1877 neither Achhan Kunwar nor Enayet Singh (even if he had been of age) could by Hindu law make a disposition of or bind their expectant interests, nor does the deed apply to any but rights in possession; and in 1881 Enayet Singh was equally incompetent to do so, though the deed purports to bind future rights. To give validity to the bonds as against the estate of Khairati Lal, the plaintiffs and appellants must shew that there was legal necessity for raising the money by a charge on Khairati's estate, or at least that in advancing their money the creditors gave credit on reasonable grounds to representations that the money was wanted for such necessity. It is not a case in which all the kindred of Khairati have assented or could assent to the bonds, or either of them, and the circumstances are not such as, in the opinion of their Lordships, to raise any presumption from such concurrence as there was of Achhan Kunwar and Enayet Singh in the first bond, or of Enayet Singh in the second bond, that the transaction was a fair one or one justified by Hindu law. In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shewn to be given with a knowledge of the effect of what they were doing, and an intelligent intention to consent to such effect. There is a complete absence of any such evidence in the present case. Achhan Kunwar was a purdahnashin lady. In her evidence

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she states that she remembers having executed a mookhtarnamah in Lalji's name with a view to manage the villages. She did not know her estate was encumbered, and came to know of the existence of debt when the Paharwalas filed a suit. She does not know the mortgagees. She did not borrow any money from them, and never heard of Lalji having borrowed money from them, but since the filing of the present suit she came to know that a demand was made upon herself and her son. "Rajah Lalji never consulted me in matters relating to the management of the estate. He was my elder and malik, and out of respect for him I could not interfere." Enayet Singh admits the execution of the power of attorney in 1877, but says that at that time he had not sufficient maturity of understanding to judge of what he was writing. Indeed, as already mentioned, he was a minor at the time. He says he signed the document of 1881 because filial duty prevented him from disobeying his father's order. So long as Lalji was alive the income of the ilaka was brought to and spent by him. His parents and he lived together. There is no evidence that either Achhan Kunwar or Enayet Singh had any advice on the matter independent or otherwise. It is unnecessary to pursue this topic further.

Nor is there any proof of any legal necessity for borrowing on the credit of Khairati's estate, or of any such representation made to the creditors as could give validity to either of the bonds sued on. It is unnecessary to discuss the evidence that was offered, because the learned counsel for the appellants very properly admitted that if it was incumbent upon them to prove a legal necessity for the borrowing, the appellants had failed to do so; but they contended, first, that the absence of necessity was not pleaded in the written statement of the defendants, and there was no issue raising the question; and, secondly, that Khairati's estate included the business of a money-lender or dealer in hundis, which was carried on after his death for the benefit of his heir under the management of Lalji, and that as such manager Lalji had by Hindu law a power to pledge any part of the estate for the purposes of the business.

As regards the bond of 1877, their Lordships think that

paragraph 3 of the written statement of the defendants sufficiently, though not in such precise or accurate language as is desirable, raises the absence of necessity for the borrowing as a defence, and that the 3rd issue, as settled by the judge after presentation of the written statement, is directed to the same point. But their Lordships observe that in a suit like the present, on a bond made by a person with restricted power of alienation, the defendants are not required to plead the absence of legal necessity for the borrowing. It is for the plaintiffs to allege and prove the circumstances which alone will give validity to the mortgage, and they repeat what was said in the judgment of this Board, in an appeal arising out of a suit on another bond executed by Hulas Kuar: *Lala Amarnath Sah* v. *Rani Achan Kuar* (1):—

"When the issues were settled this point was treated as belonging to the defence, and was raised in the form of a question how far the objections resting on the absence of necessity were tenable. It is obvious that such a mode of raising the question is incorrect, because it appears to assume that it was for the defendants to shew absence of necessity, whereas the rule is that a mortgagee claiming title under a Hindu widow as against her husband's heirs should prove the validity of his mortgage."

Moreover, it appears from the record that the question of necessity was explicitly raised in the first reason of the present respondents for their appeal to the High Court, and the present appellants, so far from complaining that the question was not in issue on the trial before the Subordinate Judge, accepted the issue, and in their 3rd and 6th reasons contended that upon the evidence it had been established that the consideration of the bond of 1877 was advanced for legal necessity after due and proper inquiry, and as regards the consideration of the bond of 1881, also that it was advanced for meeting family necessities, and in any case under the bona fide belief that it was required for such purposes and after due and reasonable inquiry. And the case was dealt with in the High Court upon this footing.

Their Lordships think that the second point made by the

(1) L. R. 19 Ind. Ap. 196.

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appellants is unsupported either by reason or authority. The owner of the business at the time of the execution of the bond of 1877 was Hulas Kuar, and Lalji was managing it as her agent only and for her benefit, and she could not of course confer on her agent any larger power than she had herself, and there is no exception from the restriction on alienation by a Hindu widow when the estate consists of or includes a business. The authorities quoted by Mr. Cowell have no application to the case. They were cases of a family business being carried on by the manager of an undivided family estate. In that case the manager of a family business has a certain power of pledging assets for the requirements of the business. But the position of a Hindu widow or daughter is not by any means the same as that of the head of an undivided family, and even in the latter case the validity of a mortgage by the manager of a family business without the concurrence of the other members of the family, or when some of those members are minors, depends on proof that the mortgage was necessarily entered into in order to pay the debts of the business. This is clear from the cases cited, including that of *Doulut Ram* v. *Mehr Chand*. (1) To use the language of Pontifex J., in a judgment quoted in that case, the touchstone of the authority is necessity.

These considerations dispose of the appeal so far as it rests on the bond of 1877 alone. But the appellants say that the earlier bond was confirmed by the bond of 1881. It remains to consider the validity of this bond as against Khairati's estate represented by the two respondents. By the 5th paragraph of their written statement, the defendants plead that they signed the bond at the earnest request of Lalji, whose position in the family influenced them, and that at the time of execution of the said bond they did not understand the nature of the document, nor were they informed that the debt incurred or admitted under the bond in question was actually payable, and was such as would create liability upon the estate of Khairati Lal. One of the issues upon which the case was tried was founded upon this paragraph of the defence. The evidence of the two respondents has been already referred to.

(1) L. R. 14 Ind. Ap. 187.

The admission of the bond of 1877 is contained only in the statement that the creditors have no deed except the bonds of May 25, 1877, and December 2, 1877, "which are payable," and this bond. The effect of these apparently innocent words was certainly not likely to attract the attention or arouse the suspicion of the executants of the bond unless it was specially explained to them.

The Subordinate Judge on this issue found in favour of the appellants. The High Court reversed this finding, and found that the bond of 1881 was not explained to Achhan Kunwar, and that it is not proved that she understood that bond or the liabilities it purported to create or admit. The Court also found that it was not proved that there was any family necessity for the making of the bond of 1881, or that the mortgagees satisfied themselves upon any reasonable inquiry that there was any family necessity for the making of that bond.

It will be convenient to examine the nature of the consideration for the bond of 1881. The first item is made up of compound interest on a bond dated May 25, 1877, and the bond of December 2, 1877. There is no evidence whatever that the bond of May 25, 1877, was binding upon Khairati's estate, or upon either of the defendants; and their Lordships have already expressed their opinion that the bond of December 2 was not binding on Khairati's estate. There is no proof that the sum of Rs.2000 was owing for revenue, or if it were that it was necessary to borrow in order to pay it. Then come two items for interest to Intzam Begam. The principal witness for the appellants was Nand Kishore, the father of Gobind Parshad, one of the appellants. He states that Lalji and Enayet Singh asked him to get some more money advanced to them; and accordingly he got Rs.30,000 advanced to them by Intzam Begam, wife of Asman Khan, and that she had obtained a decree, but against whom is not stated. Even assuming that Nand Kishore's statement may be relied on, it does not prove that Intzam Begam's debt bound the estate of Khairati Lal; but their Lordships observe that no question on this point was addressed to Enayet Singh in cross-examination and Nand Kishore's statement is uncorroborated. There is no

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explanation why the expenses of "daughter's marriage" (which apparently means a daughter of Lalji and Achhan Kunwar) should be paid out of Khairati's estate instead of by her father Lalji. And, lastly, the payment to Moti Ram Sah was for interest on the bond, which was decided not to constitute a charge on Khairati's estate in the case already referred to, and reported in 19 Ind. Ap. 196. It does not appear whom the small balance of Rs.124 2*a*. was paid to, and it is conjectured that it was applied in paying the cost of the stamp. It is therefore not proved that any part of the debt which Achhan Kunwar purported to admit, and which formed the consideration of the bond of 1881, was a debt for which Khairati's estate was liable, and as to the greater part of it there is proof that Khairati's estate was not liable for it.

The respondents' admission could not make it a debt of Khairati, or one for which his estate is liable, and that is the only question in this suit. It was not contended that the bond could be enforced against Achhan Kunwar's interest in the income of the estate during her lifetime; but their Lordships think it right to add that there is no proof, and, having regard to the relation both of Achhan Kunwar and Enayet Singh to Lalji, and to her own evidence and that of Enayet Singh which has been quoted above, the form of the professed admission of the bond of 1877, and to all the other circumstances of the case, they do not believe that the nature and effect of the bond of 1881, or of the admission of liability for past debts contained in that bond, were ever explained to or properly appreciated by either of the respondents, and they do not differ from the finding of the High Court on this issue.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be dismissed, and the appellants must pay the costs of the respondent Achhan Kunwar, who alone appears on this appeal.

Solicitors for appellants: *Ranken Ford, Ford & Chester.*

Solicitors for respondent: *Pyke & Parrott.*

SRI MAHANT GOVIND RAO . . . . DEFENDANT;

AND

SITA RAM KESHO AND OTHERS . . . PLAINTIFFS.

AND CROSS-APPEAL.

J. C.*
1898
April 26;
June 24.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Proprietary Right in Territories ceded to the British Government—Rights of Government in the Soil—Obari Tenure—Construction of Official Correspondence relative to Proprietary Right.

Jalaun having been ceded by the Peishwa in full sovereignty to the East India Company, and the ancestor of the parties having been continued in possession of an estate within its ambit, of which under the native government he was simply manager without proprietary interest therein :—

Held, that proprietary right therein could not be ascribed to him as self-acquired by adverse possession or otherwise, but was derivable from the British Government, which had full discretion not merely over the jama chargeable, but over the destination of proprietary right :

Held, further, that on a consideration of all the circumstances and official correspondence, in reference to which the Courts below had differed, the said ancestor held from the British Government for life in the first instance, with reversion absolutely in the Government, subsequently in 1867 granted as to one moiety to the defendant, and as to the other to the four sons of the ancestor living at the date of the grant.

The High Court having dismissed the plaintiffs' suit, although declaring them entitled to a moiety :—

Held, that this order must be discharged and an inquiry directed as to who are the parties now entitled to such moiety, further directions as to relief being reserved.

CONSOLIDATED APPEAL and cross-appeal from a decree of the High Court (July 30, 1890) reversing in second appeal a decree of the Commissioner of Jhansi (Jan. 14 1889) which had decreed the plaintiffs' suit, so far as it related to the recovery of possession of the riasat of Gursarai, in that respect reversing a decree of the Deputy Commissioner of Jhansi which had entirely dismissed the plaintiffs' suit.

The question raised in the appeal was whether the riasat, of

*Present: LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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which Rajah Kesho Rao died possessed after forty years' enjoyment thereof, descended to the plaintiffs as his heirs; or whether the defendant Atma Ram succeeded thereto; or whether the plaintiffs and Atma Ram succeeded thereto in equal moieties.

The Gursarai estate consisted of the town and fort of Gursarai, and of sixty-one villages appurtenant, called in the plaint a "riasat." Under the Jalaun government Balkrishen Rao and Kesho Rao, the ancestors from whom the parties to this suit are descended, had no proprietary right in the riasat. They were kamasdars or managers of the estate, accountable for their collections to the native government. Balkrishen died in 1838, and Kesho alone was intrusted by the Rais of Jalaun with the management. The British Government succeeded to the rights of the Jalaun government in 1840. Thereupon all estates within the ambit of the Jalaun territories came under the revenue administration of the British authorities. Till December, 1852, the Governor-General's agent at Bundelkhand controlled that administration. After that date the government of the North-West Provinces took charge. According to the directions to revenue officers in those provinces, promulgated under the authority of the Lieutenant-Governor, all estates would in the ordinary course be brought under direct settlement by the Collector, in which event boundaries would be adjusted, a survey made, an assessment of revenue made on the half-assets principle of administration, and a record of proprietary rights drawn up; those entitled to the surplus profit being declared to be (at least as against the Government) the proprietors of the land for which they engage to pay revenue, possessing a right which is heritable and transferable.

In the case of the Gursarai estate, Kesho Rao was admitted by the British Government to engage for the revenue, which he paid for forty years (1840-1880), being for the whole of that time in exclusive and undisturbed possession of the estate. It was directed that no village survey should be made of his estate. No record of rights was prepared for the sixty-one villages, which were always exempted from all inquiries of the settlement officer. The Government, instead of bringing the

estate to a direct settlement with the Collector at full jama, allowed Kesho Rao to pay an obari or privileged jama of Rs.22,500 annually, the relations between him and the British Government being more fully determined by the correspondence, which is sufficiently set out in their Lordships' judgment.

The plaintiffs claimed that the estate was the absolute self-acquired estate of their ancestor Kesho Rao, since his brother Balkrishen had died before the annexation of Jalaun and had obtained no title under the British Government. The defendant Atma Ram, as natural son to Kesho but adopted by Balkrishen, claimed to be entitled to the whole as son to Balkrishen, the elder brother; otherwise that his title had been derived from the Government and Parliament, or had been conferred by Kesho in his lifetime.

The Deputy Commissioner dismissed the suit on the ground "that the estate held by defendant is an obari of which he is by Government order the life holder. There is no evidence to shew that defendant possesses any hereditable zemindary rights which can form the subject of a suit like the present, no suit lying against an obari estate granted by Government for life."

The Commissioner found that "Kesho Rao had been in possession of the sixty-one villages upon an annual payment of Rs.22,500 to the Government for twelve years, when the orders were passed" (meaning in 1852) "that his rights should not be touched during his life, but that at his death the case should be reported for orders."

As to the quantum of Kesho's proprietary right, the Commissioner considered that he was in possession of a zemindary estate which had been self-acquired, the obari privilege—that is, the privilege of paying a reduced jama—being alone resumable by the Government. Accordingly, the plaintiffs as his heirs were entitled to succeed, the evidence shewing that they had never transferred their title to the defendant. His decree accordingly was in their favour that they should recover the riasat in suit.

The High Court considered that the letters of 1852 and 1867 disposed of the question of title, and that under them Kesho

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was entitled for his life, the plaintiffs and Atma Ram being at his death entitled to the absolute estate in equal moieties. The decree, however, dismissed the suit with costs in all Courts. The Chief Justice adding, that "in order, if possible, to prevent further litigation between these parties, I would make a declaration, but without costs, that the defendant Atma Ram is entitled to a moiety only of the Gursarai estates, and that the plaintiffs inter se are entitled to the other moiety. It is true that no such declaration was asked for in the plaint, and that, as a general rule, according to the decisions of their Lordships of the Privy Council which have been cited to us, a relief, a right to which is not disclosed in the plaint, and which is not asked for in the plaint, should not be granted. Mr. Reid, who has appeared before us on behalf of the plaintiffs, has pressed us to make a declaration declaring the rights of the parties in the Gursarai estate, and has informed us that the plaintiffs raise no question of their rights inter se. Mr. Reid also asked us for a decree for possession to the extent which might be covered by the declaration which we might make. This latter request we should not, in my opinion, accede to. The estate has not been partitioned, and this is not a suit for partition. Should the estate be partitioned, then the plaintiffs can get possession of those portions of the estate which may be allotted to them on partition."

Accordingly the decree of the High Court dismissed the suit "with this declaration, that the defendant Atma Ram is entitled to a moiety only of the Gursarai estates, and that the plaintiffs inter se are entitled to the other moiety."

From this decree Atma Ram appealed on the ground that this declaration should not have been made, and that the suit should have been simply dismissed. Afterwards the plaintiffs obtained special leave to cross-appeal, claiming the whole or, in the alternative, half of the estate.

Cowell, for the plaintiffs, the cross-appellants, obtained leave to begin, since their appeal raised the whole question of title, while the principal appeal related only to the inserted declaration. He contended that at the date of his death Kesho Rao

was absolutely entitled to the estate. He had been admitted to engage for the Government revenue in respect thereof for a period of forty years. There had been no confiscation of the soil of Jalaun, and no transfer of proprietary right therein to the British Government. That Government possessed only its right to revenue, which was regulated by its own revenue laws; and subject to that right the holder who engaged for the Government revenue, whether in regular settlement or in settlement on exceptional or obari terms, had prima facie a beneficial transferable and hereditary tenure against the Government, and against all other persons who could shew no beneficial interest therein. See Thomason's Directions for Collectors of Land Revenue, published by authority of the North West Government in 1848. The Rajah had held exclusive adverse possession for forty years, and had acquired by force of the Limitation Act, and at the date of his death possessed an absolute proprietary interest, subject to payment of revenue, descendible to the plaintiffs as his heirs. The right of the Government was, except so far as they were under promise to the contrary, at any time to issue a notification to bring the estate under direct settlement on full terms under s. 36 of Act XIX. of 1873.

It was contended that the documentary evidence shewed that Atma Ram had not acquired from the Rajah any title to the estate, in whole or in part, by any completed disposition thereof, testamentary or otherwise. The correspondence of the Government was referred to to shew that they did not claim or purport to exercise any rights over the estate other than revenue rights, or in derogation of the Rajah's absolute title to the soil.

Otherwise, if this contention failed, the Government letter of 1867 was conclusive against Atma Ram's title to the whole, and the suit ought not to have been dismissed. A decree should have been made in this suit giving effect to the declaration of the High Court. Sect. 265 of the Civil Procedure Code, and s. 108 et seq. of Act XIX. of 1873 authorize proceedings with a view to eventual partition and possession.

Mayne and *Ross*, for the appellants, were not called upon in reference to the question of Kesho Rao's absolute title at the date of his death. They contended that the suit should be

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entirely dismissed because the plaintiffs had not asked for a declaratory decree, but had set up a claim inconsistent with the declaration made by the High Court in their favour. On the merits the appellants no longer claimed the whole estate, or asserted title to any more than a moiety.

Cowell replied, contending that unless relief were granted in this suit any fresh suit for that purpose would be barred by limitation.

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June 24.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The question raised in these appeals arises out of transactions following on the merger of the Native State of Jalaun into the dominion of the East India Company. The earlier history of the case, which goes back so far as the year 1840, is stated both succinctly and lucidly by the learned Chief Justice of Allahabad, and their Lordships need not restate it except in bare outline until they come to the documents on which the Courts have differed. There has been very little dispute as to matters of fact; and now, as the appeal to the High Court was a second appeal, the facts found by the Commissioner of Jhansi, the First Appellate Court, are conclusively found; but the three Courts below have taken different views as to the proper treatment of the case upon those facts.

The property in dispute is the riasat or estate of Gursarai, consisting of sixty villages and some other particulars. It was part of Jalaun, one of the subordinate Mahratta States or chieftainships within the large territory of Bundelkhand, the sovereignty of which passed to the company by treaties with the Peishwa. The chieftainship was continued to the existing chief, called the Rao, and to his family, which became extinct in the year 1840. The estate of Gursarai was managed for the chief by Dinkar Rao, the head of a noble family, till his death in 1831. He had two sons, Balkrishen and Kesho. Balkrishen, having no issue, adopted his nephew Atma, one of Kesho's sons; and he died about the time of the change of dominion. When the company's officers came to make the requisite arrangements they found Kesho in occupation of the estate.

It is conclusively established in this suit that Dinkar Rao and his sons had no proprietary interest in the estate; they were only managers accountable to their chief for the revenues and bound to deal with the estate as he ordered. It is probable that the officers of the company who came to deal with the Jalaun lands were, as both the Deputy Commissioner and the Commissioner of Jhansi have intimated, under a misapprehension on this point, and thought that Kesho enjoyed some proprietary holding on a favourable rent, called locally an obari tenure. We need not examine this hypothesis very closely. It would account for some inaccurate expressions which occur in the official correspondence, but it does not affect the official acts of the authorities. Kesho made himself acceptable to the British Government and, though no sunnud or grant of any kind was made to him, his possession of Gursarai was continued, and his jama was assessed at the low rate of Rs.22,500.

The earliest official document in the record which relates to Gursarai is a letter dated October 8, 1852, from the Government of India to the Bundelkhand Agent. The material passage is as follows :—

"Case No. 1, Book 7.—Family arrangements of this description, his Lordship in Council observes, particularly where no deeds are executed, are in general open to revision on the death of incumbents. The present incumbent has done good service, and his rights should not be touched during his lifetime, but on his death, his Lordship in Council desires the case should be reported for orders."

There is no clue to the meaning of the terms "family arrangement" and "his rights." There may have been, as above observed, some misapprehension. But the important point to mark is that whatever benefit was given to Kesho, the present incumbent, was for his life only, and that everything beyond that was reserved for further orders.

Kesho has had seven sons. The eldest, Tantia, rebelled in the year 1857, but he must have made his peace with the Government afterwards, though not admitted to favour. The second, Jey, is dead, and is represented in this suit by his adopted son Madho, one of the plaintiffs. Atma was the third,

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He was the sole defendant in this suit, and appellant in the first appeal to the Queen in Council, but he has since died, and has been replaced by his eldest son, Mahant Gobind. The four younger sons are plaintiffs in this suit. Two of them were born subsequently to the transactions now about to be mentioned.

On July 31, 1866, Atma and his four then existing brothers signed an agreement to the effect that Atma, being the descendant of Balkrishen, the eldest son of Dinkar, was sharer of half the riasat, and the four others were sharers in equal shares of the other half. This agreement is of no legal validity in itself, if only because it was not registered; but it is of importance as leading up to and explaining that which has legal validity.

On August 4, 1866, Major McNeile, then Commissioner of Jhansi, wrote to the Provincial Board of Revenue intimating that Kesho was anxious to obtain the orders of Government regarding the terms on which his estate was to descend to his sons. The letter relates not only to Gursarai, but to other villages which it seems had been granted to Kesho for his loyalty during the Mutiny. The writer mentions the agreement between the brothers thus :—

"All parties interested in the matter have consented that Atma Ram shall take half the estate on his father's death, and the other four brothers one-eighth each, and this may be considered as finally adjusted."

He then goes on to suggest what shall be done with what he calls the quit-rent, meaning the obari or reduced jama. He goes into many particulars which need not be detailed now because they are summed up in a document of higher authority, which was not produced to the two lower Courts, but was before the High Court.

That document is a letter from the Board of Revenue to the Government of the North-West Provinces. The material passages are as follows :—

"The Rajah's eldest son, who was a rebel in 1857, has been set aside by a family arrangement, duly executed by all parties and attested before the Deputy Commissioner; and Atma

Ram, the third son of the present Rajah, has been declared to be the heir to the Raj by virtue of an adoption on the part of his uncle, the late Rajah.

"The rebel son of the present Rajah is consequently excluded from the succession, and there would therefore appear to be no reason why the Government should not authoritatively declare its intention in regard to the tenure upon which the estate is to be held after the death of the present Rajah."

"The proposals submitted by the Commissioner, and to which the Board see no objection, are as follows :—

"The family compact is that Atma Ram shall succeed to the Raj and to one-half of the estate as adopted son of the late Rajah Balkrishen.

"That the other four sons of the present Rajah shall each take one-eighth of the estate."

The Commissioner's proposals in regard to the estate, are :—

"1st. That the villages in Jalaun, granted in reward for the loyal services of the family, be at once resumed.

"2nd. That on the death of the Rajah, the present obari jama be raised from Rs.22,500 to Rs.25,000 per annum, and be continued to the family in perpetuity.

"3rd. That this obari grant be continued on the condition of the estate remaining in joint undivided possession of the family, and that if any member of it should cause his share to be divided off, such share be liable to assessment at full jama.

"4th. That Atma Ram be recognised as the heir to the title and privileges enjoyed by the present Rajah, the latter (privileges), which consist in the exercise of police and judicial powers, to be dependent upon a proper exercise of them by the Rajah for the time being."

It may be observed here that the chieftainship of Atama in succession to Kesho did not form a term of the written agreement between the brothers, nor does it seem to have been at this time the wish of Kesho himself. But both Kesho and his sons recognised Atma as the son of Dinkar's eldest son ; and in later years Kesho treated him as head of the family.

There are no letters in the record shewing the transmission of the proposals through the regular stages to the Governor-

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General in Council and to the Secretary of State in Council. They were probably pure formalities. The answer of the Secretary of State is dated February 25, 1867, and is as follows :—

"Having considered in Council the letter of Your Excellency's Government. No. 190, dated 23rd November 1866, in which you suggest the continuance to the loyal members of the family of Kesho Rao Dinkar of Gursarai in Bundelkhand, of the entire estate now held by him, on the term set forth by the Board of Revenue of the North-West Provinces and Commissioner of the Jhansi Division, I have to signify to you the ready assent of Her Majesty's Government to the indulgence now accorded to the family of this meritorious chieftain.

"You will of course take measures to prevent the occurrence, on the death of the aged chief, of any dispute relative to the succession of the second son."

Nobody has doubted that by the term "second son" Atma is meant. It is to be observed that this letter is not only the effective source of whatever title Kesho's descendants have, but is also the most accurate statement of the true nature of the grant to them. Previous documents in 1852 and 1866 use some inapt and inaccurate expressions such as "family agreements," "rights," "descent" of the estate, and so forth. The facts as we now know them were that such grant as was made or can be implied to Kesho was for his life only; that there was no heritable interest to descend; that the reversion was vested absolutely in the Secretary of State in Council; and that his grant is described with exact precision as a continuance to Kesho's family of the estate then held by him, and as an indulgence to them, on account, it is hinted, of his merits.

The record contains other letters which passed between Kesho, Atma, and the officers, but they do not give any additional light unless it be to shew that Kesho himself was quite conscious that the enjoyment of the property after his death was entirely in the discretion of the Government, only he claimed favourable consideration on account of his services. He lived long, and died in the year 1880. In 1878 or 1879 he intrusted the management of the estate to Atma, and declared

him in a formal letter to be head of the family. Some family disputes occurred, but were composed, at least for the time, by the officials. On Kesho's death Atma took, or more probably retained, possession. The Government accorded the title of Rajah to him, and the jama of the estate was raised, as intended, to Rs. 25,000.

How soon afterwards disputes took their present form is itself a matter of dispute, but at some time Atma refused to allow that his brothers owned shares in the estate, and they commenced this suit in March 1887. The plaintiffs claim the entire estate, as having been acquired by and inherited from Kesho; omitting mention of Tantia, and claiming to exclude Atma on the score that he had been adopted by Balkrishen. They refer to the agreement of 1866, but only to contend that it is void. The defendant Atma also claims the whole estate on the ground that it belonged to Balkrishen and had descended from him. He referred to the agreement of 1866 and to some order of Government in so obscure a way that it is difficult to know what he founds upon them. In fact, both sides put forward unsustainable claims, and neither put forward the true case. When, however, the issues came to be settled, the effect of the proceedings of 1866 was brought into question. The issue was not clearly defined, but it was clear enough for both parties to go fully into evidence, and for the Courts to treat it as being the substantial point of dispute in the case.

The Deputy Commissioner who formed the Court of First Instance shews that the family of Dinkar Rao were simply managers, and that the plaintiffs failed to prove any grant except that of the Secretary of State, which he calls the sanad on which the defendant bases his claim to succession. He dismissed the claim with costs.

On appeal the Commissioner found that the estate was acquired by Kesho, and that the plaintiffs as heirs of Kesho had a title superior to that of the defendant; and he decreed accordingly. His view, to state it very briefly, was, that in some way not now apparent the ownership of the estate had become absolutely vested in Kesho, and that the official correspondence and acts in 1852 and 1866 are explained by confining

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the discretionary action of the Government to the obari or favourable jama. That view has been supported by Mr. Cowell in argument at this bar. It is true, as before observed, that some expressions in official letters tend to imply that the writers ascribed to Kesho some proprietary interest which it is shown that he did not in fact possess. It is also true that the estate and the jama are not always clearly distinguished. But their Lordships find it impossible to read even one of the material letters without seeing that it refers to both estate and jama; and the correspondence as a whole would lose the greater part of its meaning if it were supposed that the Government was not exercising the discretion which it had to determine how the estate should be enjoyed after Kesho's death.

To this effect was the opinion of the High Court, which reversed the decree of the Commissioner and dismissed the suit, but with a declaration the effect of which and the reasons for it are explained in the following passage at the end of the judgment of the learned Chief Justice :—

"I would allow this appeal with costs, and dismiss the suit with costs in all Courts, with this exception—that in order if possible to prevent further litigation between these parties, I would make a declaration, but without costs, that the defendant Atma Ram is entitled to a moiety only of the Gursarai estates, and that the plaintiffs inter se are entitled to the other moiety. It is true that no such declaration was asked for in the plaint, and that as a general rule, according to the decisions of their Lordships of the Privy Council which have been cited to us, a relief a right to which is not disclosed in the plaint, and which is not asked for in the plaint, should not be granted. Mr. Reid, who has appeared before us on behalf of the plaintiffs, has pressed us to make a declaration, declaring the rights of the parties in the Gursarai estate, and has informed us that the plaintiffs raise no question of their rights inter se. Mr. Reid also asked us for a decree for possession to the extent which might be covered by the declaration which we might make This latter request we should not, in my opinion accede to. The estate has not been partitioned, and this is not a suit for partition. Should the estate be partitioned, then the plaintiffs

can get possession of those portions of the estate which may be allotted to them on partition."

The defendant's appeal is for the purpose of getting rid of this declaration.

Their Lordships quite agree with the High Court that as a rule relief not founded on the pleadings should not be granted. But in this case, as their Lordships have been at pains to shew, the substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues; they have been fully put in evidence, and they have formed the main subject of discussion and decision in all three Courts. The High Court are right in treating the case as not within the rule. As between plaintiff and defendant the case has been thoroughly tried out. Indeed Mr. Mayne for the defendant does not now dispute that the other members of the family are entitled to a moiety. It is quite right to make a declaration on the subject. But then their Lordships think that the terms of the declaration may be advantageously modified, and that the Court may found on the declaration an inquiry into the plaintiffs' title.

According to the letter of August 17, 1866, paragraphs 6 to 10, the persons entitled to the four shares, each to a separate share, are "the other four sons of the present Rajah." Two of those sons are plaintiffs, and one being dead is represented by his adopted son, who is a plaintiff. Tantia, the eldest, is passed over in silence. But under the family compact which is the basis of the grant, Tantia takes a share. It was his claim by primogeniture which was set aside, not his claim as a sharer, as his clearly shewn by Major McNeile's letter. What has become of his share does not appear. The two youngest sons took no share under the compact. It may be that by agreement of the brothers the plaintiffs are entitled as their counsel state; but there is no proof, and no other allegation of it. The declaration should be founded on the grant by the Secretary of State; but that will not, of course, preclude the effect of any agreement between the brothers by which the younger brothers have been or may be admitted to a share, or other transfer of interest created.

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The same reasons which support the declaration also shew the propriety of giving in this suit such effect to the declared title of the plaintiffs as circumstances may admit. The High Court has made a declaration in favour of the plaintiffs, but it has dismissed the suit. Neither Atma Ram nor his son has shewn any disposition to yield anything which the law does not exact. If the title of the plaintiffs is still disputed, they must bring a new suit, which would certainly increase expense, and in which, considering the peculiar nature of the grant, the lapse of time, and the uncertainty whether a declaration in a dismissed suit can supply a fresh starting ground, the plaintiffs would run substantial risks of miscarriage. Instead of dismissing the suit, the better course will be to direct an inquiry who are the persons now entitled, and to reserve further directions, under which it will probably be found possible to place them in legal possession, and so to terminate this unfortunate litigation. The High Court has quite rightly refused to make any order for possession under present circumstances.

Th decree does not notice the personal position of Atma as head of the family. He is now dead, and it does not appear that the title of Rajah or any other position of dignity which the Crown may confer has been conferred on his successor. The provision against partition appears also to concern the Treasury alone, which was not willing to continue the favourable jama to any sharer who would not hold his share in an undivided state.

With regard to costs, their Lordships think it just that both parties should bear their own. Both have made excessive demands. The plaintiffs have persisted in theirs up to the present moment. The defendant persisted in his before the three Lower Courts, though in the High Court he made an alternative case that he was at all events entitled to a moiety. Even now, though he does not claim the entirety, his whole appeal is grounded on his objection to any declaration as to the moiety which is not his. And he has excluded his co-sharers at least till the High Court judgment was delivered, if not later.

Though their Lordships agree with the High Court on the

substance of the case, and indeed are doing little more than to apply the views of the learned judges in a more ample way, it will be simpler in point of form to discharge their decree and to substitute a decree to the following effect :—Reverse the decree of the Commissioner of Jhansi. Declare that the defendant Atma Ram was entitled to a moiety only of the Gursarai estate, and that his successors in title are now entitled to a like moiety. Declare that the other moiety belongs to the persons entitled thereto by virtue of the letter of the Secretary of State in Council dated February 25, 1867, and according to the terms of the letter of the Board of Revenue dated August 17, 1866 (that is to say), the four brothers of Atma then living referred to in the last-mentioned letter, or those who represent them in title. Inquire who, having regard to the above declaration, are either directly or by inheritance, transfer, agreement, or otherwise, entitled to the last-mentioned moiety. Declare that, as regards all proceedings in the Courts below, the parties are to bear their own costs respectively. Reserve further directions, and costs subsequent to this decree.

As regards these appeals, both parties are in the wrong, and they must bear their own costs.

Solicitors for appellants : *Pyke & Parrott.*

Solicitors for respondents : *Ranken Ford, Ford & Chester.*

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RAM CHURN SINGH . . . . . PLAINTIFF;

AND

RANIGUNGE COAL ASSOCIATION, LIMITED . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Lease with Proviso of Relinquishment—Construction—Relinquishment of Lands void if any Part retained in Possession.

By deed of relinquishment in pursuance of a clause of optional istafa (resignation) contained in a mokurruri pottah executed a few years earlier by the appellant to the respondents, the latter intimated that from a specified date they would only remain in possession of 565 bighas and would not remain in possession of the remaining 1409 bighas, and that the appellant "would be at liberty either to settle the said lands and jumma with others, or to retain them in khas possession." They also intimated a reduction of Rs.8456 from the annual rent payable under the pottah, the clause of istafa authorizing a reduction of Rs.6 a bigha in respect of lands relinquished.

It appeared that notwithstanding this deed the respondents retained possession of 35 bighas, part of the said 1409 bighas:—

Held, that the istafa was invalidated. Absolute precision in the statement of the area of relinquished land was necessary, for the plain meaning of the clause was that the istafa alone should form the basis of future relations between the contracting parties, no further step being contemplated beyond measuring the land relinquished and deducting the rent calculated on such area. It would defeat the plain intention of the parties if the istafa could be restricted by the respondents continuing in possession of any, even of an unsubstantial, part of the lands relinquished.

APPEAL from a decree of the High Court (July 24, 1894) reversing a decree of the Subordinate Judge of Deoghur (Nov. 11, 1893).

The facts are stated in the judgment of their Lordships.

The appellant sued the respondents for rent due on the area of the whole land as originally leased. The respondents pleaded that the company had relinquished the greater part of the land originally leased to them, and had paid the proper rent for the portion retained. The substantial question was

* *Present*: LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

whether the relinquishment in fact made was one which the appellant was bound to recognise. The original Court held that it was not. The High Court held that it was.

The First Court decided the third issue, which is set out in the judgment, in favour of the appellant on the ground that the respondents "did not actually relinquish the whole of the area they profess to give up under their notice," because they collected rents from cultivators and allowed the coolie huts to stand.

The judge held that it was too late at that stage of the case to deduct the area occupied by the huts, or that for which rent had been collected from the relinquished land, because there was no case of mistake of calculation or measurement; but he did not hold that there was any intentional withholding of enjoyment.

The High Court reversed this decree. The judges found that within the relinquished area there were huts occupied by the defendants' coolies, and covering 8 bighas, 8 cottahs, and that there were some plots of paddy land, measuring 26 bighas, of which the defendants were still in possession, by realizing rents from them. They held, however, that these facts did not vitiate the relinquishment altogether, but only lessened the area actually relinquished, thereby enlarging the rent due. They, therefore, decreed that from the beginning of 1299 the defendant company had been in possession of 600 bighas, upon which rent was payable at Rs. 6 per bigha.

Mayne, for the appellant, contended that this decision was wrong. The act of relinquishment was single and inseperable, and, being bad as a the part retained, was bad altogether. Whatever the true construction of the relinquishment clause, the actual relinquishment relied upon in answer to the action was invalid, for the defendants did not actually relinquish the whole area which they professed to give up under their notice. The evidence shewed that they allowed coolie huts to remain on part of the area included in their notice, and allowed the huts to be occupied by coolies working their mines, and also that they collected rents from cultivators of another part of the land included in their notice. The Subordinate Judge was

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right in regarding this proceeding of the defendants as a fatal mistake. The result is that the notice of relinquishment was never carried out, the defendants are in actual possession of land which they say is relinquished, and it is not open to them to say that accounts should be taken and adjusted, and allowances made in respect of the part retained.

Crackanthorpe, Q.C., and *Phillips*, for the respondents, contended that the decrce of the High Court was correct. It was shewn that the respondents intended to relinquish, and did in law effectually relinquish, their rights under the pottah in the whole of the 1409 bighas. The 35 bighas were included in the area over which surface rights had been enjoyed, and for which separate rent had been paid before the relinquishment; but after the relinquishment no rent had been received from the ryots on account of such surface rights—Mostajiri and other—the tenants withholding their rent. Even assuming that the rents alleged to have been paid were proved to have been paid in respect of land in the relinquished area for a period after the relinquishment—all of which was denied—such receipt ought not to be attributed to a withholding of any right purported to be relinquished, there being no intention to that effect on the respondents' part. It should rather be attributed to the exercise of surface rights retained, or else to mistake or inadvertence, and should not have been held from any point of view to invalidate the relinquishment of the 1409 bighas if the same was otherwise in accordance with the pottah. With regard to the coolie huts, the pottah imposed on the respondents no obligation to remove them—at any rate without being requested to do so—and no such request was made. If the rights which purported to be relinquished have been inadvertently retained, the appellant had obtained from the High Court all the relief in respect thereof to which he was entitled.

Mayne, replied.

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July 7.

The judgment of their Lordships was delivered by

LORD WATSON. By a mokurruri pottah, dated February 26, 1886, Bar Kumar Bhaia Gopal Lal Singh, the father and

immediate predecessor of the appellant, let to the respondents, the Ranigunge Coal Association, Limited, an area of 1974 bighas, 8 cottahs, and 8 gundahs of land, situated in the Sonthal Pergunnahs, sub-division Deoghur, as delineated upon a relative plan, with all underground and surface rights pertaining thereto, at a yearly jumma of Rs.6 per bigha, amounting in all to Rs.11,846 8*a*. 6*p*, 1. 3. It was declared that coal, limestone, and iron were to be included in the subjects let, but that the tenants were to have "no title to work gold or silver, or copper or lead, or any other precious metals which may be found out." Power was given to the tenants to set up collieries, make coal-pits, erect houses and bungalows for dwelling purposes, establish bazaars, make gardens, and excavate tanks; and also full power to alienate their interest in the whole or any portion of the lands, or to make dur-mokurruri settlement, or to underlet.

The following provision, out of which the present action arose, was made in favour of the tenants: "Further, it will be always open to you, whenever you may like, to tender istafa" (resignation) "of the whole or any portion of the lands settled under this pottah. If such istafa be made in respect of the whole or any portion of the land, then you shall get a deduction in the rents at the rate of Rs.6 per bigha for the extent of land that may be found on measurement to have been so relinquished and, with the exception of the deduction in the total amount of rents to that extent, all the other terms and conditions of this deed shall remain in force and operative." The option thus given was qualified by the provision that the tenants should not have right to relinquish by selection pieces of land from which the coal may have been to the very last worked out, or pieces of land from which all the trees may have been destroyed to their very roots owing to any act on their part; and also that they should pay the full amount of rent for the whole of the Bengali year in which the istafa might be made by them.

On April 4, 1892, an istafa or deed of relinquishment was executed on behalf of the respondent company by their manager, Mr. Whiffen, and was on the same day presented to

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the magistrate for transmission to the appellant. On April 8, 1892, the appellant granted an acknowledgment that he had received notice of the deed, and protested against the validity of the relinquishment upon the ground that the jungle of the lands had been destroyed by the respondents contrary to the terms of the mokurruri pottah, and that the plan which accompanied the deed, which professed to be a copy of the plan incorporated with the original pottah of 1886, with the lands to be relinquished delineated upon it, had not been compared or verified in his presence.

The deed in question contained an intimation to the effect that from the year 1893 the respondent company would only remain in possession of the 565 bighas of land marked on the plan, and would not from that date hold possession of the remaining lands, "measuring an area of 1409 bighas, 8 cottahs and 8 gundahs, according to the standard measurement, and representing a jumma of Rs.8456 8*a*. 6*p*. 1. 3. at the rate Rs.6 per bigha. The second party ghatwal is at liberty either to settle the said lands and jumma with others, or to retain their khas possession. The first party company have no claim or objection thereto."

The plaint in this action was filed in the Court of the Subordinate Judge of Deoghur on December 12, 1892. The appellant having previously declined to accept payment of a quarter's rent for the 565 bighas which were not sought to be surrendered, the amount had been paid by the respondent company into the court of the Subordinate Judge. In his plaint the appellant claimed decree for the full amount of rent stipulated in the mokurruri pottah of 1886 on the ground that the renunciation tendered was invalid. The respondents lodged a written statement, in which they controverted all the material averments made by the appellant.

Issues were adjusted, and the case went to proof before the Subordinate Judge. The third of these issues—the only one which, for the purposes of this appeal, their Lordships think it necessary to notice—was in these terms: "Did the defendant association actually relinquish the land or hold possession thereof, or of any portion of it, after the alleged relinquishment

under tha lease dated the 15th Falgoon, 1292, or under any other right ?" Upon that issue the Subordinate Judge held that the respondents did not actually relinquish the whole of the area which they professed to give up. He found that, "In the first place, they have allowed coolie huts to remain on the area they profess to have relinquished, these huts being occupied by coolies who are working their mines ; and, in the second place, they have collected rents from cultivators who hold land there." Decres was given to tue appellant for the full rent claimed by him ; but it is right to explain that, in arriving at that result, the learned judge relied not only upon the failure of the respondent company to quit possession of the whole lands which they professed to relinquish, which he describes as "a fatal mistake," but also upon the fact which he found, in the absence of evidence to the contrary, that Mr. Whiffen, their manager, had not authority to execute the deed of relinquishment on behalf of the company.

On appeal to the High Court at Calcutta, Norris and Banerjee JJ. reversed the decision of the Subordinate Judge. By their decree these learned judges, in lieu of the judgment which they set aside, declared that out of the 1974 bighas, 8 cottahs, 8 gundahs of land originally leased to them the respondents had, from and after the date at which they had made a relinquishment, been in possession of not only the 565 bighas which they porfessed to retain, but of 600 bighas ; and they gave decree against the respondents for the rent of these 600 bighas at the rate of Rs. 6 per bigha, with interest at the rate stipulated in the mokurruri pottah upon each instalment of rent from the date at which it became due and payable.

Their Lordships entertain no doubt that, although the Courts below differed as to the extent of the respondents' liability for rent which resulted from that conclusion, they were agreed in finding that, in point of fact, the respondents had not surrendered possession to the appellant of the whole area of land which they professed to relinquish. And, having regard to the evidence which was before them, and to the reasons which were assigned by the Subordinate Judge and by the learned judges of the High Court, their Lordships have had no difficulty

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in coming to the conclusion that both Courts were agreed as to the particular portions of the total area described as relinquished of which the respondents had failed to surrender possession. The judges of the High Court indicated, in terms which are entirely consistent with the findings of the Subordinate Judge, that the respondents, notwithstanding their professed relinquishment, had retained possession of 9 bighas, which were occupied by coolies employed in working their coal mines, and of 26 bighas, for which they had drawn rents from the cultivators. It was strenuously, and with some plausibility, argued by the respondents' counsel that the views expressed by the learned judges of the High Court, taken per se, did not amount to actual findings; but that contention became hopeless when it appeared that their views were made the basis of the decree pronounced by the Court of Appeal, which finds the respondents liable in rent for these 35 bighas in addition to the rent of the 565 bighas of which alone they professed to retain possession. No adequate cause has been shewn for disturbing these concurrent findings of fact, which are the basis of conflicting judgments in the Courts below; and their Lordships therefore accept them as concluslve in disposing of this appeal.

The Subordinate Judge held that the surrender made by the respondents was ineffectual to qualify their mokurruri lease, or to relieve them of their obligation to pay rent for the whole 1974 bighas, 8 cottahs, and 8 gundahs, because they had retained possession of 35 bighas out of the 1409 bighas, 8 cottahs, 8 gundahs, which they had professed to surrender. On the other hand, the learned judges of the High Court held that the respondents had effectually surrendered 1374 bighas, 8 cottahs, 8 gundahs, being 35 bighas less than the area described in their istafa of April 4, 1892. The learned judges arrived at that result upon the principle that the 35 bighas retained were so small an area in proportion to the 1409 bighas, 8 cottahs, 8 gundahs sought to be relinquished, that the surrender must be regarded as substantial and sufficient. The ratio of their decision is thus explained in the judgment of the High Court: "But here the relinquishment is regulated by the contract entered into between the parties; and that con-

tract expressly allows the tenant at any time to relinquish the whole or any portion of the land let out. The mere fact of the tenant remaining in possession of the land he professes to have relinquished will not, therefore, necessarily vitiate the relinquishment altogether. The proper question for consideration in this case, therefore, is not whether the possession by the lessees of a part of the land professed to be relinquished makes the relinquishment invalid as a matter of law, but whether such possession renders the professed relinquishment unreal in point of fact, or, in other words, whether such possession from its nature or extent indicates that the lessees have, notwithstanding their relinquishment, been enjoying a substantial portion of the benefits resulting from their occupation of the land relinquished, and that the relinquishment is made only with a view to avoid the burden of paying rent."

Their Lordships do not find it necessary to discuss the question whether, if the terms of the mokurruri pottah had admitted of approximate equivalents for the total area professed to be relinquished, the decision of the learned judges would have been correct. In their opinion, no such equivalents are admissible. The right of relinquishment is a privilege given to the tenants, by means of which they may restrict the lease and establish their tenure upon a new basis, or may extinguish the lease altogether; and the tenants cannot avail themselves of that privilege to any extent unless they strictly observe the conditions which are either expressed or are plainly implied in the lease itself. In so far as it concerns the power of relinquishment, the scheme of the contract embodied in the lease is exceedingly simple. The istafa, or, in other words, the resignation made by the tenants, which, by the plainest implication, must contain a precise statement of the area to be relinquished, is to form the basis of future relations between the contracting parties; and, in order to fix for the future the rent which the tenants are liable to pay and the lessor is bound to accept, the lease contemplates that no step shall be necessary beyond measurement of the area surrendered, and deduction of an amount calculated at the rate of Rs.6 per bigha for such area from the original rent. Their Lordships may observe that, in their

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istafa or deed of surrender, the respondents complied with the requirements of the lease, and distinctly intimated that, as soon as the surrender took effect, the appellant would be in a position either to let the relinquished area to tenants, or to assume khas possession of it. To adopt the construction put upon the lease by the High Court would, in their Lordships' opinion, defeat the plain intention of the contracting parties. It is equivalent to holding that the istafa tendered may be qualified or restricted, not by the tenants making a new surrender, which would be within their competency, but by their simply continuing to hold possession of part of the area which they had surrendered. In that case, the future rent could not possibly be ascertained by measurement of the area described in the deed of relinquishment. Its ascertainment would, in that case, involve an investigation, and probably a litigation also, as to the precise extent of the land of which the tenant had retained possession—an inquiry which is not contemplated by the lease—before the amount of future rent could be settled.

Their Lordships think it right to notice that the respondents endeavoured to justify their retaining possession, not of the 9 bighas occupied by mining coolies, but of the 26 bighas which they let and drew rents for, upon the ground that they held these 26 bighas, not as tenants under the original pottah of February, 1886, but in virtue of their right as mostajirs holding of the appellant by a separate title. The pottah, which expressly lets to the respondents all "underground and surface rights" in the 1974 bighas, 8 cottahs, and 8 gundahs demised, makes mention of these mostajiri rights as having previously existed, and describes them as having been made over to the appellant's predecessor in title. There are deeds in process which prove that the transfers were made to him by the mostajirs; but there is not a tittle of evidence to shew that the rights exercised by the mostajirs ever became vested in the respondents, or that the respondents had any title to possess these bighas which they claim the right to retain other than that which they derived from the mokurruri pottah.

Being of opinion that the istafa, or surrender, upon which the respondents' defence to this action rests was invalid in law,

their Lordships will humbly advise Her Majesty to reverse the judgment of the High Court, to restore the decree of the Subordinate Judge, and to order that the respondents shall pay to the appellant the costs incurred by him before the High Court. The respondents must pay to the appellant his costs of this appeal.

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Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondents: *Lattey & Hart.*

SAYED MAZHAR HUSAIN . . . . . DEFENDANT;

AND

BODHA BIBI. . . . . PLAINTIFF.

SAYED MAZHAR HUSAIN. . . . . DEFENDANT;

AND

BODHA BIBI AND ANOTHER . . . . . PLAINTIFFS.

J. C.* 1898 *Feb.* 16; *Aug.* 3.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Mahomedan Law—Letter a valid Will—Invalidity of Will by a Suicide—Evidence.

A letter which, whatever its particular mode of expression, in effect confers rights of property to take effect on the death of the writer acts as a will under Mahomedan law.

The onus of shewing that such will was made after and not immediately before taking a dose of poison, and therefore to be questioned as the Act of a suicide, is on those who impugn it: and on the evidence was not discharged.

CONSOLIDATED APPEALS from decrees of the High Court (Jan. 11, 1894) setting aside decrees of the Subordinate Judge of Allahabad (March 17, 1891) in two suits.

These suits were brought by the respondents to obtain possession of immovable property in the possession of one Haidri Begum, which her son, Ibn Ali, by his will gave to certain persons who conveyed their rights in it to the present respondents.

* *Present*: LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

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The First Court held that this will was an invalid document, and dismissed the two suits. The High Court, holding that the will was valid, reversed this decision, and remanded the suits to the First Court for further inquiry.

Ibn Ali died of arsenic, administered by himself, unmarried and without issue, on August 2, 1878, leving as his sole heir his mother, Haidri Begum, and three cousins, the daughters of his uncle, named Nazir Bandi, Habib Bandi, and Rahim Bandi. On August 1 he wrote a letter to his general agent, Zain-ul-Abdin, which is the document relied on as his will. The letter professed to be written an hour before his death, and after he had taken poison in consequence of some exposure so great that he could not shew his face to any one. In it he stated that it was his desire that his mother should not get a pie out of the property. He then apparently directed that his landed property should be given to his grandmother and the wife and daughters of his paternal uncle, and his movable property to his father's sister. He then (paragraph 10) said: "I have made a mistake in the distribution of shares. You should not have the property given to (my) grandmother and paternal uncle's wife, but you should give the whole to my three sisters, who are my paternal uncle's daughters. You should see that they all get an equal share, and in the same manner as stated by me in paragraph 3."

In each of the two suits the plaint sought to have the validity of the will established to the extent of one-third of the testator's property, and, on behalf of the assignees, claimed to recover all such interests as were validly bequeathed by Ibn Ali.

Various issues were recorded, of which only one had been tried, namely, the existence and validity of the will.

The Subordinate Judge dismissed both suits, holding that the letter to Zain-ul-Abdin did not in law amount to a will, and that in any case it was invalid, as being made by a person who had already taken poison with a view to committing suicide.

(1). That the plaintiffs had failed to prove any verbal bequest on the part of Ibn Ali.

(2.) That the contents of the document dated August 1, 1878, did not amount to a will, and, according to Mahomedan law as observed by the Shiah sect, a bequest could not be inferred from such a declaration in writing.

(3.) That even granting that the document dated August 1, 1878, amounted to a will, such will was void and uninforceable, because Ibn Ali, the testator, made it after taking poison.

The High Court, on the contrary, came to the following conclusions :—

First, they said, " We think that the finding, that the letter was written after the writer had poisoned himself, is based on flimsy evidence, and is against good and solid evidence to the contrary. So far, therefore, the appellant succeeds, and the bequest, if it was a bequest, is not bad for being the act of a suicide."

Second, they held that the letter of August 1, 1878, constituted a valid will under the Mahomedan law of the Shiahs, and they concluded their judgment as follows :—

" In what we have said, we have tried to shew that the very terms of this will are virtually the terms which the Court below would accept as fulfilling the requirements of the Shiah law as to bequests. We believe that the word ' bequeath ' has been rightly defined under that law ' as the act of conferring a right in the substance or the usufruct of a thing after death.' We find on the 460th page of the first volume of Syed Ameer Ali's book on the Mahomedan law relating to Shiahs, that a bequest may be constituted by the use of any expression that sufficiently indicates the intention of the testator. See also *Mahomed Altaf Ali Khan* v. *Ahmed Buksh* (1), where their Lordships held that 'no particular form, even of verbal declaration, is necessary as long as the intention of the testator is sufficiently ascertained.' If this decision was between Shiahs, and we have no reason to think otherwise, it lends the strongest authority to our view of the effect of paragraph 10 of Ibn Ali's document of August 1, 1878. The result of these our findings is that this case must be remanded, under s. 562 of the Code of Civil Procedure, to be restored to the register of

(1) (1876) 25 S. W. R. 121.

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original suits, and to be disposed of on the other issues according to law. The costs will abide the result."

Mayne and *Raikes*, for the appellant, contended that the High Court should have found that there was no evidence that the poisoning took place after the will was made. But whether it did so or not was immaterial if the will was made in contemplation of suicide by a person who immediately afterwards committed suicide. Reference was made to Indian Evidence Act, s. 101 ; Taylor's Medical Jurisprudence (2nd ed.), pp. 256, 262 ; Baillie's Imameea, p. 232, and the book called Riyaz-ul-Masoel, commonly known as Sharah Kabir, and cited in the judgment of the Subordinate Judge, chap. iv. on wills, containing a passage in Arabic, which he translated thus: "If any one intentionally wound himself so that there is a danger of death and then makes a bequest, such bequest will not be accepted."

Ross, for the respondents, contended that the letter of August 1, 1878, constituted a will in favour of the respondents' assignors. The finding of the Subordinate Judge that the poisoning took place before the will was made was based only on certain expressions contained in the letter, was wholly unsupported by the evidence, and was opposed to the probabilities of the case. He referred to Baillie's Imameea, p. 232, p. 26, and to p. 25 of the Introduction.

Mayne, replied.

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Aug. 3.

The judgment of their Lordships was delivered by

LORD MORRIS. Ibn Ali died on August 2, 1878. He was possessed of property. The respondents are the assignees of two ladies, the first cousins of Ibn Ali, and described in the letter or will of August 1 as his paternal uncle's daughters.

The appellant is the assignee and representative of Haidri Begam, the mother and heir of Ibn Ali. The respondents claim the property in dispute under a letter or will of August 1, 1878.

Two questions arose: 1st. Whether the letter of August 1 amounted to a will. 2nd. Was it written after Ibn Ali had

taken poison, from the effect of which he died. On both questions the Subordinate Judge decided in favour of the appellants, holding that the passages in the letter of August 1 did not amount to a bequest, and that even if they did it was written after Ibn Ali had taken poison, the cause of his death. On appeal the High Court reversed the decision of the Subordinate Judge on both questions. The bequest on which the respondents rely is contained in the letter written by Ibn Ali to his general attorney, Syed Zain-ul-Abdin. The fact of the writing the letter by Ibn Ali was clearly proved, and was so accepted by the Subordinate Judge, and is not now disputed. The letter was sent by the hand of Musharraf, a servant of Ibn Ali. The Subordinate Judge decided that the contents of the letter did not amount to a bequest, as they did not bequeath the property directly to his cousins. The letter by clause 10 states : " You should not have the property given to (my) grandmother and paternal uncle's wife, but you should give the whole to my three sisters, who are my paternal uncle's daughters. You should see that they all get an equal share, and in the same manner as stated by me in paragraph 3." This paragraph appears to their Lordships to confer a right on the three sisters in the property to take effect on Ibn Ali's death, and, accordingly, that the letter acts as a will under Mahomedan law.

Now comes the more important question, as to the writing of the will being before or after the poison was taken by Ibn Ali. It is not at all free from difficulty, but their Lordships are not prepared to dissent from the decision of the High Court. It appears reasonable to hold that the onus of proving whether the letter or will was written after the swallowing of poison should rest on the party impugning the will. The Subordinate Judge came to his conclusion apparently on the terms of the letter itself, in which the writing states : " I, in consequence of my honour having suffered to a certain extent, and the exposure being so great that I could not shew my accursed face to any one, thought it advisable to put an end to my life, and therefore took poison and died to-day" ; and again in paragraph 5 the writer states : " Please begin to take all

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these proceedings after perusing this letter. Don't delay in hope of my life, for, by God, I am actually dead, and this letter I have written an hour before death." The Subordinate Judge considers these passages prove that Ibn Ali had taken the poison; but their Lordships are of opinion, though the words "took poison" are in the past tense, they are connected with the words "and died to-day," which cannot be read in the past tense, and the statement is consistent either with the fact that he had taken the poison, or that he had resolved to take poison and resolved to die. The evidence is circumstantial, and the evidence of Musharaf and Husain Bakh go strongly to shew that it must have been subsequent to the sending of the letter that Ibn Ali retired from the mardana and went into the zenana on August 1, then apparently well. The circumstances lead their Lordships to agree with the conclusion of the High Court, that the deceased Ibn Ali took the poison after sending the letter to his friend, who lived some twenty miles distant. Their Lordships will, therefore, humbly advise Her Majesty that the appeals in this case should be dismissed. The respondents will have their costs.

Solicitor for appellant: *T. C. Summerhays.*

Solicitors for respondents: *Barrow & Rogers.*

NIRMAL CHUNDER BONNERJEE . . . PLAINTIEF; J. C.* 1898

AND

MAHOMED SIDDICK . . . . . DEFENDANT. *June* 14, 15; *July* 8.

Benami Transaction—Conflicting Evidence as to Title and possession—Limitation.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Case in which, after conflicting decisions in the Courts below on conflicting evidence as to title and possession and acts of ownership extending over many years, it was found by their Lordships, overruling the decision of the High Court, that a deed of gift executed in 1858 by a Mahomedan widow to her son-in-law was satisfactorily proved to have been a benami transaction.

The probabilities, together with the more definite outlines of the evidence, should be followed when details are numerous and complicated.

Held, that the widow's reception as of right within the statutory period of a substantial part of the income from the property comprised in the deed was sufficient legal possession to prevent the bar of limitation.

APPEAL from a decree of the High Court (Feb. 1895) reversing a decree of Macpherson J. (April 30, 1894), which had decreed the appellant's suit with costs.

The question was one of fact, whether the hiba-bil-ewaz, admittedly executed in 1858 by the appellant's ancestress Said-un-nissa, under which the respondent claimed, was a benami transaction, the real title to the properties remaining with Said-un-nissa from whom and from whose alienees the appellant derived title under conveyances by them executed in 1890. The High Court held that the onus lay on the appellant to shew the benami character of the hiba of 1858; that no reason had been shewn for resorting in 1858 to a sham conveyance; that the appellant had failed to shew that from the time of its execution up to the date of suit no change of possession or enjoyment had taken place; that there was no evidence that the appellant or his predecessors in title at any time either took possession themselves or received rent from the tenants.

**Present* :—LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

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They concluded as follows: "We find, therefore, that plaintiff has failed to prove that at any time since 1858 up to this suit he or his predecessors in title have been in possession of any of these properties; so that even if he should have any title, his right has become extinguished under operation of the law of limitation. On this ground alone the suit must fail, quite irrespective of conclusions on which we may be induced to arrive on the merits."

Sir E. Clarke, Q.C. and *Branson*, for the appellant.

The respondent did not appear.

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July, 8.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. This suit was instituted on January 26, 1893. The plaintiff prays for a declaration of his ownership, and of his right to registration. The defendant alleges that he is owner. The property consists of several houses and parcels of land in Calcutta. Each party claims to be in possession. Each party derives his title from a lady named Said-un-nissa, who in the year 1858 was the undoubted owner. Neither party is or has ever been in actual physical possession of any part of the property, which has been let to tenants. The possession alleged on both sides consists in granting leases, obtaining kabuliats, and recovering rent. From the year 1880 onwards an irregular and indirect legal warfare has been carried on by the rival claimants, each suing a tenant of some portion of the property for rent. This suit is the first attempt to put the whole title directly in issue between the principal claimants. An objection has been taken to its form, but both Courts below have maintained it; and it seems to their Lordships not only the most convenient, but a strictly regular way of bringing the dispute to a close. In point of fact, the pleadings and evidence and judgments relate, not to the liabilities of this or that particular tenant or parcel, but to the validity of the rival claims to ownership as a whole.

The suit was tried in the High Court of Calcutta on the Original side. The Original Court decided for the plaintiff. The Court of Appeal differed, and dismissed the suit. That

decision is challenged in the present appeal. It is unfortunate that the respondent does not appear, for the case is one of much intricacy, and though the appellant's counsel have done their best to present it with fulness and fairness, the want of an opponent is a sensible disadvantage.

In January, 1858, Said-un-nissa executed a hiba or deed of gift, by which she transferred her property to her son-in-law Mozuffer, under whom the defendant claims. Between 1880 and 1890 she executed several transfers, by the last of which, in April, 1890, the whole of her interest, together with that of her transferees, became vested in the plaintiff. The main question is whether the hiba is a substantial or a benami transaction. It is not disputed that whatever interest she passed to Mozuffer vested in his heirs, nor that whatever interest she then retained has vested in the plaintiff. There is a subordinate question whether this suit has been brought within due time; but it will be found that the decision on the first point involves findings which will govern the second.

In order to apply the evidence it is necessary to understand the state of Said-un-nissa's family. In 1858 she was a widow, with one son named Woodor, who was born about 1845, and one daughter, Raj-un-nissa, who was married to Mozuffer, the grantee of the hiba, and had issue by him. Mozuffer also had issue by an elder wife, a son called Nabi. By Raj-un-nissa he had four sons and two daughters. The eldest son was named Ali Akhtar, born about 1856, the second, named Mansur, died in 1884, and the third, Makdur, in 1887, both without issue, at what ages is not stated; the fourth, Masrur, is still living. One of the daughters is dead without issue; the other is living and married. Mozuffer died either in 1876 or 1878, and his wife about two years after him.

The first observation about the hiba is that it gave away the whole of Said-un-nissa's property, not only the Calcutta houses, but other valuable lands which it seems she had acquired at various times. It left her without means, and also disinherited her son, as to the amount of whose property we have no evidence, and her daughter too, in favour of her son-in-law, who might alienate the land, and whose inheritance would pass to

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an extent then quite unascertainable to his issue by other marriages, or to other wives and their issue. It is impossible to deny the great improbability that such a transfer should be made for Rs.100 and a copy of the Koran, which is the consideration stated in the hiba. It is to be observed here that the Court of Appeal were under the impression that the gift was made to Raj-un-nissa, which would no doubt be a less improbable action. As the matter stands, the least that can be said of it is this—that it disposes the mind to receive without difficulty evidence shewing that the transfer was purely nominal.

So far as direct evidence goes, there is non at all to explain why such a gift should be made. There is some, not in itself very cogent, to shew that it was a benami transaction. Of the attesting witnesses, two alone survive. Sajat Ali was the gomashta of Said-un-nissa's husband, and afterwards of hereself, and he collected her rents. He says that the hiba was executed to baffle claims for dower by the representatives of Woodor's wife, who had recently died. The other witness is Golam Abbas, who was a connection of Said-un-nissa, and held an ijara from her, and at the date of the hiba was staying in her house. He corroborates Sajat as to the motive for the hiba, and gives an account of the attending circumstances perhaps too minute to be very trustworthy. Both those witnesses are very old men, and Macpherson, J., who presided at the trial, observes that they speak with some degree of confusion ; but he receives their evidence and relies on it, though not strongly. Neither of them has any apparent motive to favour the plaintiff. They leave on their Lordships the impression that they could hardly have invented the idea of a benami gift, and that probably there was something said at the time to the effect that they state, though we cannot be sure of the details. So far the evidence runs in accord with the antecedent probability.

The next question is whether any change was made in the treatment of the property. The only contemporary evidence is that of the two old men. Sajat says that after the hiba there was no change in his duties. He continued keeping accounts as he did before. He applied his receipts for the family

expenses of Said-un-nissa. "Mozuffer Hossein never asked me to pay the money over to him or to any one else, but asked me to go on in the same way as I did before." Golam says that when staying in Said-un-nissa's house he saw a tenant named Dhonai paying rent to her after the hiba, and that he himself paid rent to her under his ijara, which endured only for two years, but overlapped the date of the hiba. Unfortunately, both at this date and at other periods of the history there are no written accounts. The positive evidence is not strong, but, so far as it goes, it shews that Said-un-nissa's position was not altered by the hiba for some little time, it may be two or three years afterwards. This, again, is in accordance with antecedent probabilities.

During the rest of Mozuffer's life the evidence is almost a blank. It is clear that he and his mother-in-law were on the most friendly terms. He resided in the Burdwan district, and used to visit her at Hosseinabad, where her house was, and in the neighbourhood of which most of her land was situated. Being a Mahomedan lady of a rank which precluded her from appearing to any but relatives and intimates, she necessarily did her business through some other person, and during Mozuffer's life he acted for her to a considerable extent. As regards the Calcutta property, by himself or by an agent named Rahatalla, he collected rent; but there are no accounts or other evidence to shew how much he received or how he applied it, nor whether his position and conduct after the hiba differed in any way from his prior position and conduct. Said-un-nissa, however, went on living at her home in Hosseinabad, and no evidence is adduced to shew that she lived in any more humble or any different way than formerly. Not a suggestion is offered on the part of the defendant to explain what she had to live on if she had parted with all her property. The inference seems almost irresistible that she must have received support out of that property; and if she did, it is difficult to stop short of the conclusion that the whole of the ostensible gift was a sham by the intention of both parties.

When Mozuffer died the property would, supposing the hiba to be valid, descend to his widow and children. None of them

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at that time appear to have made any claim to it, nor indeed has any claim ever been made except by Ali Akhtar and Masrur, who have transferred their interests to the defendant. This circumstance is not explained. Of course the defendant is not bound to explain it, as the plaintiff can only succeed by the strength of his own title. But it is one of the phenomena which go to create doubt whether Mozuffer was in his own family considered to be the owner of the property. Ali attempts some explanation by alleging an arrangement by which is surviving sister relinquished her interest to him. But this story of his is very confused and contradictory, and the Original Court justly refused to believe it. Even if it were true, it would not account for the inaction of Raj-un-nissa, or of her other sons, Nubi, who is still alive, Makdur, who lived till 1887, and Mansur, who lived till 1884, and who not only did not claim against Said-un-nissa, but on an important occasion took part in an assignment of the property by her. In the face of these facts it is impossible to think that the property contained in the hiba was considered by Mozuffer's family as his own.

There is evidence that during the short time for which Woodor survived Mozuffer, he intervened in the management of the property, though the extent of this intervention is not made very certain, and again no accounts or writings are produced. Wasek Ali, a witness whose evidence will hereafter come to be carefully considered, says that Woodor employed him in doing some of the business; and a tenant named Sage says that he paid rent to Woodor so long as he was alive, and when he died did not pay. It is at any rate certain that during Woodor's life there was peace as profound as during the life of Mozuffer.

Woodor died in January, 1879, and soon afterwards we enter on a period of great confusion. Ali put forward claims to be owner of the property. This was resisted on the part of Said-un-nissa, and there ensued the state of contest which has been brought to a head in this suit. There is nothing to explain why Said-un-nissa should have resisted Ali's acts of ownership if she had really made over the property to Mozuffer, and he had been in enjoyment of it for twenty years. It is certainly

unlikely that this old lady would of herself have disturbed the status quo in which she had acquiesced so long, or that anybody should have done it in her name. Whereas it is not difficult to understand that after Mozuffer's death and that of Woodor, Ali coming fresh to the business, finding the hiba and the ostensible title given by it, and knowing that his father had collected rents, should have thought that his claim was maintainable in law, and have felt little scruple in preferring it.

How Ali dealt with the mofussil property their Lordships cannot ascertain; for his own statements as to his proceedings cannot be looked upon as accurate, and Macpherson J. places no reliance on him. That learned Judge deals with the matter in this way. He is speaking of the time after Mozuffer's death :—

"After that, Said-un-nissa and Ali Akhtar appear as rival claimants, and proceed to deal with the property in a way which leads me to regard suspiciously the claim of both. I gather from the evidence that Ali Akhtar first began to sell, for he says that he has sold all the mofussil properties comprised in the hiba, that the first sale was in 1286 or 1879, after the death of his father, and the last about ten years ago, and he gives the names of several purchasers. I do not know what the result of all these sales was; but it is clear from the evidence of Bhola Moitro, one of the purchasers, that the sale to him was disputed by a purchaser at a sale in execution of a decree against Said-un-nissa, and that he failed to satisfy the Court that he was in possession, although he sticks to the story that he got and still holds possession."

It seems, then, that in the only mofussil case of which we have anything like clear evidence, Ali and his transferee were unsuccessful.

Ali also alleges that he made sale of a parcel of land for Rs.66 to Affil, a first-cousin of Said-un-nissa, and one of those to whom she conveyed interests in the Calcutta property. This is brought forward to discredit Affil, who supports Said-un-nissa's title. Affil says that the sale was provisional, and was undone and the money returned. This matter has but little bearing on the main stream of evidence, and their Lordships do not pursue it.

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On January 31, 1879, Wasek Ali brought an action in the name and on behalf of Said-un-nissa against one Ostagur for rent of one of the houses, and a decree was obtained in April, 1879. A like action was brought on April 7, 1879, against Sage for use and occupation of land of the plaintiff. A decree was obtained, and upon non-payment Sage was committed to gaol on August 19, 1880. Two observations are to be made on this case. One is that it is proved by the same deposition of Sage in which he states that he paid his rent to Woodor as above mentioned. The other is that Ali speaks of Ostagur as one of the tenants from whom he collected rent, and says not only that he collected rent from Sage on several occasions, but that he obtained a decree against him; whereas the only decree forthcoming is that of Said-un-nissa. These observations have an important bearing on the evidence of Wasek Ali, which exhibits in more detail the strange way in which Said-un-nissa and Ali appear as interchangeable characters with respect to the Calcutta property.

All the foregoing events are valuable only as bearing on the true position of Said-un-nissa and Mozuffer's family. As this suit was not instituted till January 26, 1893, they do not shew possession by the plaintiff within twelve years. The next series of transactions has a bearing on hoth these questions. But it will be observed that at the two most critical points of the history—namely, the execution of the hiba, and the death of Mozuffer—the result of the evidence is not to shew that any change took place in the management of the property, but to make it probable that Said-un-nissa's position was not changed. It is not till after the death of Woodor that conflict begins.

It commences on July 19, 1880, when Said-un-nissa executed to one Saadut Hossein an ijara of all the Calcutta properties for a term of ten years, at a rent of Rs. 14 per month. One of the witnesses to this deed is Mansur, Ali's brother, and he wrote Said-un-nissa's name to it. On August 4 following Ali executed to Saadut an ijara of the same property at the same rent for five years. On July 19 a kabuliat was prepared as from Saadut to Said-un-nissa. On August 4 or 6 this very document, retaining the same date, only with the name of

Said-un-nissa struck out and the name of Ali substituted, was executed by Saadut and delivered to Ali. That these curiously mixed and contradictory proceedings should create great confusion of interest is easy to understand, and it is not so easy to explain either their cause or their effect. It is all the more difficult because none of the parties to the dispute has been in physical possession of the property. All has been in the hands of tenants, and possession must be determined by receipt of rent or by the nature of legal proceedings. Another element of complication is that Said-un-nissa was at times residing in Ali's house. She was there when she died. Indeed, it is alleged by Affil and Taffil, her cousins, that Ali put her under duress there, and that they called in the police to deliver her from confinement. Nothing turns on this charge, which Ali denies; but it shews a strange mixture of interests. That Saadut was in legal possession as lessee for nearly ten years, when he transferred to the plaintiff, is clear; but on the question whose tenant he was the Courts have differed.

His first agreement was with Said-un-nissa. He says that Ali came to him and shewed him the hiba. He did not previously know Ali. He thought there was a hitch, and so got an ijara from Ali and attorned to him by the kabuliat. He remained in possession for nearly ten years, certainly claiming for the last five years under Said-un-nissa's ijara; and towards the end of that time he assigned the remainder of that ijara to the plaintiff, together with the rents then in arrear, which were recovered by the plaintiff in a series of law-suits.

The view taken by the Original Court is that Saadut in the first instance took the lease from Said-un-nissa; that it is by no means clear that he did not get possession before his arrangement with Ali; that foreseeing disputes he chose to have two strings to his bow; and that he cannot be held to have ousted the possession of Said-un-nissa because he chose to attorn to Ali for five years. Their Lordships are disposed to think that this is a just view; but they add to it that Said-un-nissa is also shewn to have had some substantial enjoyment, if not the whole enjoyment, of the property, even during the five years covered by Ali's ijara.

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Saadut himself says in general terms that he paid rent to Said-un-nissa during that time. His agent Wasek Ali enters into details. After shewing receipt of rents from tenants during several years, he produces accounts ranging from Srabun 1287 to Choitro 1292 (say 1880 to 1885), when they end abruptly by reference to a document not in the record. These accounts shew Saadut's payment of the rent which would fall due under either of the ijaras. Wasek describes them thus :—

"A. Yes ; I kept an account of the payments of rent by him as ijaradar. Those entries were regularly made by me in the books. I got receipts for the rent paid by Saadat Hossein.

" (Shewn a bundle of documents).

" These documents came into my possession. When we paid the rent we got these receipts. The money used to be sent through me. Yes ; I paid the money, sometimes to the grandson of Said-un-nissa, Ali Akhtar Mea or Abdul Mansur, sometimes to a maid-servant named Metah, sometimes to Tasadduck Hossein or to Taffil-ud-din ; sometimes I went to Hosseinabad myself and paid it. These persons whom I have named used to come to our house—I mean No. 40, Mott's Lane—and sometimes I went over to Tasadduck Hossein, and there paid him the rent.

" This continued for three or four years."

The receipts produced in court are not in the record, and their Lordships are not informed who signed them. Wasek's accounts bear out his general statement. The Court of Appeal treated them as of no value, but the only reason assigned is that the first payment of rent is entered for Srabun 1287, when Saadut could have received no rent and was attorning to Ali. Now Wasek was not asked about this matter, which may perhaps easily be explained. It is anyhow a very slight reason for rejecting accounts ranging over five years, having all the appearance of regularly kept accounts, sworn to as such, and supported by receipts to which their Lordships cannot find that any objection is taken. What is the alternative to saying that the accounts are honest and genuine ? They must be forged, and supported by perjury ; and to say nothing of the gravity of

making such an imputation without evidence, and of the entire absence of apparent motive for Wasek to commit crimes for the sake of the plaintiff, it seems to their Lordships that to forge such detailed accounts as these would be a very difficult task to accomplish, and one very easy to expose. Moreover, Ali gave his evidence after Wasek's accounts were put in, and he does not address himself to them, nor does he produce any accounts of his own. He merely states in general terms that he collected rents from Saadut.

It is true that the accounts disclose a very abnormal state of things; but on any supposition the state of things was very abnormal. They are stated as between Said-un-nissa creditor, and Saadut debtor. The credit side shews the monthly instalments of rent due, and the debit side shews the payments by which the rent was discharged. Among them are a number of payments "to the Bibi herself," some direct, some said to be through Sajad Ali (whether the old gomashta or not does not appear), or through her cousins and supporters—Affil, Taffil, and Tasadduck—and some through Ali himself and Mansur. It seemed to the judges below impossible that Ali, making the claims that he did, should in any way have acted as an intermediary between Saadut and Said-un-nissa. But, considering all the relations between the parties, the fact that Said-un-nissa must have had something to live on, and that no other source of support is shewn, and considering the curious incident that Ali claimnd as his own the decree against Sage, which terms out to be Said-un-nissa's decree, the state of things alleged by Saadut and Wasek, though strange, is by no means incredible. It is best to adhere to the positive evidence of Wasek that he made payments to or on account of Said-un-nissa. But if we are to guess, it may have suited Ali's views to tide over the presumably short time of his grandmother's life by letting her receive the rents, while placing himself in a favourable position to claim the property on her death. That is at least more likely than that Wasek should have perpetrated very elaborate forgeries which have escaped detection or even challenge.

Then some letters are produced written by Wasek as Saadut's

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agent to Ali during the period covered by the accounts. They are said to be absolutely inconsistent with the supposition that Ali received anything on Said-un-nissa's behalf. Their Lordships cannot see that. She had now no single agent, as in the time of Mozuffer and of Woodor. Several persons intervened in her affairs. Once accept the idea that Ali was one, and the inconsistency disappears. The letters shew that Wasek treated Ali as having a right to intervene and enforce the payment of rent, but by what title he did that, and how he applied the payments when got, is another question.

Indirectly one of the letters confirms Wasek's position. On the 4th Srabun 1290 he writes, "ten or twelve days ago Rs.12 were paid to you." Turning to the account for that year, we find that in the preceding month of Asser Rs.12 are entered as paid through Tasadduck. Thus it appears that a payment made to Tasadduck, who acted throughout in Said-un-nissa's interest, is represented to Ali as a payment on account of his own demand, and there is no trace of any objection by Ali. If the money was really paid to Ali, why should it not be so entered in the account? This is a material step towards the position taken by Wasek that the payments made by him were made to various persons on the same account, and that the account of Said-un-nissa.

Their Lordships hold it to be proved that during the year 1891 and afterwards Said-un-nissa received as of right at least a substantial part of the income. That is a legal possession sufficient to relieve the case from the bar of time. They turn now to the litigation in the Small Cause Courts.

Their Lordships have carefully examined the records of these suits, upwards of twenty in number, which have been referred to in the Courts below and at the bar here. The only cases in which the rival titles were represented by plaintiff and defendant respectively are the suits brought by Ali against Saadut. On March 27, 1885, Ali sued Saadut for arrears of rent under Ali's ijara. Saadut pleaded that he had paid no rent to Ali as tenant to him, and that he had executed a lease in favour of Ali under misconception. After many meetings and adjournments the suit was dismissed on April 21, 1887, for want of

jurisdiction. On June 15, 1887, Ali sued again for other instalments of rent. Saadut pleaded res judicata, and the suit was dismissed. The Court of Appeal cannot understand the ground of these judgments. Neither can their Lordships. But the fact remains that when Ali tried to enforce his claims under his ijara he failed, and there is no evidence that he ever recovered any rent after Saadut's first refusal to pay him. On the other hand, it appears by a note in Wasek's accounts that on November 25, 1887 a decree was made in a suit by Affil and Taffil (then trsnsferees from Said-un-nissa) against Saadut for rent due in Pous 1291, either in 1884 or 1885. Their Lordships do not find the particulars of that suit in the record.

The other suits are against tenants in occupation: five by Ali or his transferee Siddick, and the rest by Saadut or his transferee Nirmul. These litigations have so little influence on the result that they need not be reviewed in detail; but it is a just observation by the Original Court that in the suits on Siddick's side no substantial defence appears. In some of those on Nirmul's side the title of Ali was set up as a defence. Let us take as a specimen the suits against Saran Chunder Dey, a tenant who by misfortune or misconduct was more frequently the object of litigation than any one else.

On August 20, 1885, he was sued by Ali. No defence is stated, and a decree was at once passed ex parte.

On January 16, 1890, he was sued by Siddick, who had then taken his transfer from Ali, on the ground of a lease alleged to have been made by Ali to Dey in 1292 (1885). No defence is stated. There were several adjournments, and on March 22, 1889, Siddick put in the Hiba and Ali's conveyance to himself; and he obtained judgment.

On March 29, 1889, the same tenant was sued by Saadut for use and occupation of the same piece of land. In this suit he defends himself, denying any tenancy from Saadut, and alleging a tenancy under Siddick. There were several meetings and adjournments. On two occasions Siddick appeared and gave evidence. On November 27, 1889, a decree was given to Saadut.

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In December, 1889, Dey moved for a new trial on the following grounds :—

"1. That plaintiff's ijara of the land in No. 33, Mott's Lane for ten years from Said-un-nissa Bibi is not proved.

"2. That the Court should have held that Ali Aktar had resumed khas possession of the land in 1292, and had ultimately sold the same to Mahomed Siddick by a bill of sale dated August 1, 1887.

"3. That the Court should have held that Mahomed Siddick was defendant's landlord by virtue of the bill of sale.

"4. That defendant had discovered the original lease shewing the ijara given to plaintiff by Ali Aktar for five years."

On July 5, 1890, that application was dismissed.

The same result attended two other rent suits instituted by Nirmul in the year 1891, in which Siddick appeared as a witness to support his own title and to defeat that of the plaintiff. These decisions in the Small Cause Courts are not decisive of the present controversy, but they exhibit the struggle that was continually going on for legal possession of the property ; and the cause of Ali and his transferee does not gain anything by examination of them.

Many points have been much discussed in the Courts below and here which have been barely or not at all noticed by their Lordships. There is a story of a re-conveyance by Mozuffer to Said-un-nissa ; a story of Ali relinquishing his ijara and kabuliat ; a story of conversations with him in which he admitted Said-un-nissa's title ; and there are disputes about his alleged coercion of his grandmother, his sale to Affil, and his adjustments of property with his sister. These matters are left either wholly unproved, or in obscurity ; and they are not of importance enough to justify further investigation. Their Lordships have tried in this very complicated case to follow the most definite outlines they can find, and they will now try briefly to sum up the views they have already expressed more at large.

The alleged gift to Mozuffer is highly improbable, and one for which no explanation whatever is given. There is some little contemporary evidence to shew that he was intended to

be a benamidar. Though he intervened in managing the property and collected rents, there is nothing to shew whether or no he had been acting for his mother-in-law previous to that event. There is nothing to shew on what Said-un-nissa could have lived unless she lived on her former property. There is evidence to shew that at all events for some time after the hiba there was no alteration in her mode of living. The perfect peace and friendship which subsisted during the twenty years of Mozuffer's life shews at least that she was satisfied. When Mozuffer died, his family made no claim. None of them except Ali and perhaps Masrur has ever made any claim. Mansur assisted when Said-un-nissa executed the ijara to Saadut. It is thus shewn that Mozuffer's family did not look upon this property as part of his inheritance. Woodor survived Mozuffer for a short time; it may be year or it may be more. It was he, and not Mozuffer's representatives, who collected rents; and it is certain that during his life no dissension broke out. Soon after his death in January, 1879, difficulty arose; first with Sage and Ostagur. Sage could not or would not pay: he was at once sued, not by Mozuffer's representatives, but by Said-un-nissa; apparently as a matter of course, and without any doubt thrown upon her right. And so it was with Ostagur. And yet the ostensible or paper title was then in Mozuffer.

That brings us to April, 1879; and pausing there, and supposing that the question had then arisen whether the property belonged to Said-un-nissa or to Mozuffer, and that the evidence given was such as is found in this record, their Lordships think it would warrant a confident conclusion that Mozuffer took only as benamidar. Some of the streams of evidence are slight, but they all flow in the same direction. Is there anything in the later time, when Ali appears upon the scene, to reverse that conclusion?

So far as Said-un-Nissa's dealings go, the conclusion is strengthened; for she now enters on a course of dealing with the property which is not justifiable except on the supposition that she believed herself to be its true owner. She is the only person who after Mozuffer's death could know at first hand the exact truth of the case. She is dead, and cannot now be cross-

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examined on the evidence afforded by her conduct. But is it conceivable that she should have given away her property, have gone on for more than twenty years treating it as belonging to somebody else, and then suddenly have treated it as her own without any apparent alteration of circumstances moving her to do so? Though she was old and a purda lady, nobody suggests that her acts were not spontaneous, or that she did not understand her own business. It is shewn by the evidence of Saadut and Wasek that she did take part in business; and, indeed, Ali himself says that he took her to task about the ijara, and that she was ashamed of herself, not that she pleaded weakness or ignorance, or disclaimed responsibility. On this record no explanation of her conduct can be found except that she really believed herself to be the true owner.

It must be admitted that the story of the rival ijaras presents some obscure problems. Ali had some success with Saadut. The relations between him and Said-un-nissa, and the various relatives who acted with or for her, are very puzzling. But these things do not touch the essence of the case. It does not appear that Ali attempted to eject Saadut after the termination of his five years' ijara, though according to his contention he was owner of the reversion. For some reason or other he failed to make good his claims against Saadut even under the ijara, and for aught that appears he abandoned them. And neither he nor his transferee has succeeded in recovering rents from tenants either under the ijara or by his reversionary title in any case in which the two rival titles have been brought by evidence into opposition with one another.

Those are the main reasons which induce their Lordships to hold that the view taken by the Original Court was the correct view. They think that the decree appealed from should be discharged with costs to be paid by the defendant, and that the decree of Macpherson, J. should be restored. They will humbly advise Her Majesty to this effect. The respondent must pay the costs of this appeal.

Solicitor for appellant: *J. F. Watkins.*

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NEPEAN AND OTHERS . . . . . DEFENDANTS. *June* 15, 16; *July* 12.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF LOWER BURMA, RANGOON.

Law of Burma—Mortgagor and Mortgagee—Appropriation of Payments--Accounts—Allowances for Disbursements and Expenses of Management.

The Burmese Courts are directed, in the absence of any statutory law applicable to accounts against a mortgaegee in possession, to follow the guidance of justice, equity, and good conscience :—

Held, that thereunder a mortgagee in possession is not bound to give credit for his receipts against that debt which is most burdensome to his mortgagor.

Whether any improvement made by him, and any expenditure incurred for that purpose, are reasonable are questions of fact on which concurrent findings will not be disturbed.

Salary to a manager cannot be allowed in an account of "moneys laid out in management" unless shewn to have been actually paid. But the cost of maintenance for the mortgagee's son living separately from him, and engaged in the management of the mortgaged property, may. After the son has himself become the mortgagee by the death of his father such cost will no longer be allowed.

APPEAL from a decree of the Judicial Commissioner (Dec. 14, 1896) varying on second appeal a decree of the Divisional Commissioner of Tenasserim (July 19, 1895), which had varied a decree of the District Judge of Shwegyn (June 18, 1895).

The suit had been to redeem certain lands which the respondents deriving title from John Nepean claimed to hold free of any equity of redemption; and certain accounts following a decree of redemption and specified in the judgment of their Lordships, had been directed against the respondents.

The facts and the questions at issue are stated in the judgment of their Lordships.

* *Present*: LORD WATSON, LORD HOBHOUSE, LORD DAVEY, AND SI RICHARD COUCH.

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Haldane, *Q.C.*, *Branson*, and *Turner*, for the appellant, contended that the decree appealed from was wrong in allowing to Charles Nepean, the son of John Nepean, a salary as manager of the mortgaged property at the rate of Rs. 1,200 a year for twenty-one years—1874 to 1894. The item amounted to Rs. 25,200, carrying interest to the extent of Rs. 53,214, making a total of Rs.78,414. The first was an item which ought not to have been allowed to a mortgagee looking after land in his own interest; the second, being interest on salary, is not allowable in any case. The manager was not entitled to be allowed anything directly or indirectly in respect of his management. Expenditure on improvements ought not to have been allowed, especially as it was unreasonable in amount, and had been incurred without notice to the mortgagor and without his consent.

With regard to the rule of law applicable, by English law a mortgagee is allowed to take his own course as to credits and debits, and rests may be allowed. By civil law, as explained by Sir W. Grant (see *Clayton's Case* (1) and Fisher on Mortgages, 4th ed. para. 1242), a mortgagee is bound to apply the amount received by him to pay off compound interest debts before simple interest debts. It was contended that a Burmese mortgagee was in the same position as a mortgagee under civil law: see Transfer of Property Act, 1882, s. 76, (*a*), (*b*), and (*c*). For the general principle on which accounts are taken, see Tagore Law Lectures, 1876, p. 254. The duty was to apply the balance, after deducting expenses for management, improvements, and clearing jungle, to the reduction of the more onerous burden. Reference was made to *Union Bank of London* v. *Ingram* (2); *Cockburn* v. *Edwards* (3); *Jaijit Rai* v. *Gobina Titwari* (4); *Kader Moideen* v. *Nepean.* (5); Transfer of Property Act, 1882, s. 76.

Fox, for the respondents, contended that the accounts had been taken according to the law and practice in force in India and Burma. On the questions of fact arising during the

(1) (1816) 1 Mer. 606.
(2) (1880) 16 Ch. D. 53.
(3) (1881) 18 Ch. D. 449.
(4) (1884) Ind. L. R. 6 Allah. 303, 310.
(5) (1894) L. R. 21 Ind. Ap. 96.

inquiry and taking of the accounts, there are concurrent judgments of the Courts below. The allegation that the appellant has been improved out of his estate is not substantiated. Besides, he was kept informed of all that was going on, and for twenty years he stood by without objection, until he found that the estate had become very valuable. Sums laid out on improvements were directed to be brought into the account by the original decretal order. As regards expenses of management, the estate required a resident manager, and the mortgagee occupied the residence provided as manager and not as mortgagee, and cannot be charged with rent. If a substantial and well-built dwelling-house was provided, it was with the implied consent of the mortgagor, and it must be regarded as a permanent improvement rightly chargeable for in the account. The appellant having failed to carry out the decree by payment, he is now absolutely debarred of all right to redeem the mortgaged lands.

Branson replied.

The judgment of their Lordships was delivered by

LORD DAVEY. The action out of which this appeal arises was commenced some years ago by the present appellant, for the redemption of a large tract of land situate in the district of Shwegyn in Lower Burma, which was originally waste land belonging to the Government. The respondents deriving title from one John Nepean, who died in 1883, denied the mortgage, and claimed to hold free from any right of redemption. The appellant's right to redeem was finally established in an appeal to this Board, and by an Order in Council dated June 27, 1894, the decree of the District Judge of Shwegyn, which had been reversed by the Judicial Commissioner of Lower Burma, was restored with a slight variation in the form of accounts thereby directed. The accounts as varied were as follows :—

(I). An account of what is due to defendants for principal and interest on their mortgage in this case, namely, all debts due to them from plaintiff, and all money expended by them on behalf of plaintiff in paying Government dues on the land,

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together with compound interest at 10 per cent. per annum upon these moneys.

(II). An account of all sums of money laid out by defendants on improvements and management of the land comprised in the said mortgage, with simple interest at the rate of 10 per cent. per annum on the amounts expended by the defendants from the respective dates of such expenditure to the date of taking the said accounts.

(III). An account of all rents and profits received since June 3, 1871, by defendants or any of them, or by deceased J. Nepean, whose representatives they are, or by any other persons acting by the order or for the benefit of defendants or deceased J. Nepean.

In compliance with these directions, the respondents brought in three accounts which have been carefully and fully investigated by the District Judge of Shwegyn with the assistance of Mr. Villa, who was named a Commissioner to take the accounts, and there have been appeals to the Commissioner of the Tenasserim Division, and to the Judicial Commissioner of Lower Burma. The present appeal is from the decree of the Judicial Commissioner, dated December 14, 1896.

The difficulty of taking the accounts has been much increased by the fact that John Nepean in his lifetime, and the respondents since his death, either believing themselves to be absolute owners, or thinking that there was not any prospect of the appellant redeeming the lands, kept no proper mortgage accounts, and such accounts as there were are said to have been eaten by white ants. Since the year 1874 the lands have been under the general management of the respondent Charles W. Nepean, who was a son of John Nepean. On his father's death Charles W. Nepean became entitled to a share of his estate, including this mortgage. Charles W. Nepean resided on the property while his father resided at Shwegyn, where he carried on a business as a money-lender.

No question in this appeal arises on Account No. I. (the amount due for principal lent and Government dues paid with compound interest), or upon Account No. III. of rents and profits received. But the appellant complains (and this is his

first point) of the way in which the amounts found due on Account III. have been dealt with on appeal by the Commissioner of the Tenasserim Division, whose judgment in this respect was confirmed by the Judicial Commissioner of Lower Burma. The learned Commissioner has in each year deducted the rents and profits received in that year, as shewn by Account No. III., from the balance of interest on expenditure then due, as shewn by Account. No. II. It should be observed that the amount of the receipts was in each year less than the balance owing in that year for interest on expenditure.

The Burmese Courts are directed, in the absence of any statutory law applicable to the case, to follow the guidance of justice, equity, and good conscience. Mr. Haldane contended that there is no rule of abstract justice in taking the accounts of a mortgagee in possession, and that the Indian rule, which is now embodied in the 76th section of the Transfer of Property Act, 1882, should, though the Act has not been extended to Burma, be followed there in preference to the English practice. The 76th section (*h*) provides that a mortgagee's receipts from the mortgaged property shall, after deducting the expenses mentioned in clauses (*c*) and (*d*) and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of his interest on the mortgage money, and so far as such receipts exceed any interest due in reduction or discharge of the mortgage money. The expenses mentioned in clauses (*c*) and (*d*) are for Government revenue and other charges of a public nature, arrears of rent, and repairs. Their Lordships are not prepared to dissent from Mr. Haldane's contention on this point, but it is really unnecessary for them to express any judicial opinion on it in the present case. The Commissioner of the Tenasserim Division intended to follow the Indian rule, as appears from his judgment and from the variation he made in the decree of the District Judge, in directing a set-off of the receipts in each year against the balance due for interest on expenditure in that year. But inasmuch as the receipts were in each year less than that balance, and as (Account II. bearing only simple interest) the balance of interest did not carry interest, it really makes no

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difference in the result whether the receipts are set off year by year, or the sum of the receipts at the end of the account is deducted from the sum of the amounts due on Account II. Mr. Haldane's real contention was that the receipts ought to have been deducted from the interest due year by year on Account I., which bears compound interest, so as to stop pro-tanto the interest running on that interest, or (in other words) that the mortgagee was bound to give credit for his receipts against the debt which was most burdensome to the mortgagor. Their Lordships can find no warrant in principle or in authority for this contention. They agree with the judgment on this point delivered by the Judicial Commissioner, and they do not think that the mode in which the account is stated is inconsistent with the rule laid down in the Indian Transfer of Property Act.

The appellant's next point was on items 12, 13, 14, and 15 of Account II. Item 12 is for "planting fruit-trees, digging well, fencing garden, &c," in connection with the manager's house. Item 13 is for "a large brick house, shingle roof, at Thayet Kone," and items 14 and 15 "for out-houses, and fencing compound and making masonry well." Item 12 was objected to as an unreasonable and unnecessary improvement. The house referred to in item 13 was a substantial house, for which Rs.14,500 is claimed in the mortgagee's account, with Rs.17,400 for interest. It was built for the use of Charles W. Nepean when in management of the property in place of a former house of a less substantial character, for which Rs.1500 is claimed in item 11. This latter house had fallen out of repair, and according to the respondent's evidence it was necessary to replace it by a more substantial erection. The appellant contends that the expenditure was unreasonable and unnecessary, and such as cannot be charged against a mortgagor. The questions whether any improvement made by a mortgagee in possession is reasonable in its character, and whether the expenditure on such improvement is reasonable in amount, are questions of fact. The Commissioner of the Tenasserim Division allowed item No. 12 at the reduced amount Rs.400, instead of Rs.4000 as claimed; and with regard to items 13, 14,

and 15, he thought that the amount claimed by the respondents was altogether an exorbitant sum to spend on a house for the manager, and that a much less pretentious house would have suited the purposes of the estate, and he allowed Rs.5000 for those three items. The Judicial Commissioner confirmed these findings. There is therefore a concurrence of opinion on a question of fact between the two learned Commissioners, and their Lordships would not, in accordance with their usual practice, be disposed to disturb their finding, even if they did not altogether concur in it. But in this case they think that the Court below has dealt with the questions on the evidence before them in a manner which is quite satisfactory, and they have no hesitation in agreeing with the result.

The next point is on item 39 for "four elephants employed for eight years (1871 to 1879) on the land for special purpose, clearing jungle and other work at Rs.100 each month." Rs.38,400 was claimed by the respondents for this item, with Rs.74,800 for interest. The Commissioner for the Tenasserim Division has allowed Rs.3200 with corresponding interest, and this allowance has been confirmed by the Judicial Commissioner. It was not disputed that it was reasonable to employ elephants for the purpose, and there was evidence that four elephants belonging to Mr. Nepean were (at any rate) from time to time employed; but it was contended that the employment was casual and occasional, and that it was charged to and paid for by the cultivators. The evidence, however, on the latter point is vague and inconclusive. In this case again their Lordships are satisfied with the finding of the two Commissioners, and will not disturb it.

The only remaining point is on item 54, for "management, of land for $23\frac{1}{2}$ years at Rs.350 per month." The respondents claimed Rs.97,300, and interest Rs.117,570. The Commissioner for the Tenasserim Division allowed a salary to Charles W. Nepean at the rate of Rs.100 per month, and his decision was confirmed by the Judicial Commissioner. The appellants object, on the ground that the decree allows only "sums laid out" by the defendants in management of the land, and there is no evidence of any salary or allowance being paid to Charles W.

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Nepean as manager of the property. The evidence shews that Charles W. Nepean received an education in surveying and practical engineering in this country, and, on his return to Burma in 1874, took charge from his father of the whole estate in dispute and resided on the land; but he did not actually draw Rs.350 a month, and he stated that he drew money from his father whenever he wanted it. He subsequently states that his father advanced him money to carry on the estate, and at the yearly meetings his father had memoranda of what he gave him, and that his father required from him information as to how the money had been expended. The conclusion their Lordships come to upon the evidence is that during his father's lifetime the respondent Charles W. Nepean was in the position of a son maintained by his father and living at his expense, and at the same time assisting him in the management of his business, but that there was no agreement between him and his father that he should receive any salary or remuneration for such assistance, and that he never in fact received anything in the form of salary. The Courts below thought that an estate of this kind could not be managed without a resident manager, and that if the respondent Charles W. Nepean had not undertaken the management some other person must have been employed at a salary, and it was therefore reasonable that an allowance should be made to the mortgagees for a salary to Charles W. Nepean, as well during his father's lifetime as subsequently, though none was in fact paid. Their Lordships do not dissent from the view thus expressed as to what might have been reasonable, and if the Court had been asked in framing the decree to insert a special direction that such allowance should be made, it would probably have been acceded to. But in taking an account of "moneys laid out" they think it would not be right to allow to the mortgagee in possession as a disbursement or salary to a manager which was not in full paid either in form or in substance. Their Lordships, however, think that although a salary cannot be allowed as such, yet during John Nepean's lifetime the cost of the separate maintenance of Charles W. Nepean while absent from his father's

home and engaged in the management of the property may be allowed to John Nepean as a disbursement or "moneys laid out in management." And they think that Rs.100 per month is not an unreasonable or excessive amount to be allowed for that purpose. After the father's death there is more difficulty. Charles W. Nepean was then himself only the mortgagee, and was residing on the property and managing it for the benefit of himself and his co-mortgagees, and their Lordships think it would be contrary to principle to allow either a salary or allowance for his maintenance in such circumstances.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the Judicial Commissioner of Lower Burma, dated December 14 1896, be varied by disallowing so much of the sum of Rs.25,200 for principal, and Rs.53,214 for interest charged against the appellant, being item No. 54 in the Account II of the respondents, as represents the allowance of Rs.100 per month after the death of John Nepean, and the interest thereon with consequential variations, and that in other respects the said decree be confirmed.

As the appellant has succeeded partially only on one of his points, and has failed on his other points, their Lordships direct that the appellant shall pay to the respondents one half of their costs of this appeal, and they make no other order as to costs.

Solicitors for appellant : *Withers & Withers.*

Solictors for respondents : *Carlisle, Unna, Rider & Heaton.*

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